

This electronic thesis or dissertation has been downloaded from the King's Research Portal at <https://kclpure.kcl.ac.uk/portal/>



Youth justice reform in Chile Origins and Results

Pérez Morgado, Paula Isabel

Awarding institution:
King's College London

The copyright of this thesis rests with the author and no quotation from it or information derived from it may be published without proper acknowledgement.

END USER LICENCE AGREEMENT



Unless another licence is stated on the immediately following page this work is licensed

under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International

licence. <https://creativecommons.org/licenses/by-nc-nd/4.0/>

You are free to copy, distribute and transmit the work

Under the following conditions:

- Attribution: You must attribute the work in the manner specified by the author (but not in any way that suggests that they endorse you or your use of the work).
- Non Commercial: You may not use this work for commercial purposes.
- No Derivative Works - You may not alter, transform, or build upon this work.

Any of these conditions can be waived if you receive permission from the author. Your fair dealings and other rights are in no way affected by the above.

Take down policy

If you believe that this document breaches copyright please contact librarypure@kcl.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.

YOUTH JUSTICE REFORM IN CHILE: ORIGINS AND RESULTS

Paula Pérez Morgado
PhD in Law

Abstract

In its recent history, Chile has developed several reforms to its justice system. Amongst them, the reform to youth justice has taken place and its effects have yet to be fully investigated.

This thesis analyses the origins and impact of legal reform in the youth justice field. The policy-making process is examined to discover which elements have had influence over the policy and implementation.

Youth justice reform in Chile was propelled by the re-democratisation process undertaken following Pinochet leaving government and the ratification of the UN Convention on the Rights of the Child, both events occurred in 1990.

The research objectives of this thesis are addressed using a mixed methods strategy in which primary and secondary qualitative and quantitative data are analysed. I have reviewed the parliamentary debate of the new Act and have interviewed key experts to analyse the context of the reform, as well as comparing judicial files for young people, processed by courts located in Santiago de Chile before and after the reform, which will help to reveal the changes in the legal procedure.

From exploring the policy-making process of this reform, I have reached two main conclusions. First, in a democratic context a series of stakeholders have to reach agreements responding to external forces that can be, as in this case, highly contradictory. For Chilean youth justice reform, two predominant groups holding opposite views have been identified: one group sought to adapt local legislation to international standards while the other tried to use this piece of legislation to demonstrate that something was being done about crime control.

Findings from the case analysis show that while improvements to the procedure are effectively happening, there are a series of problems that need to be resolved in order to accomplish the objectives that the current Act contains (of holding young people responsible for their offences and simultaneously offering programmes that would favour their social reintegration).

Table of Contents

Abstract.....	2
Table of Contents.....	3
Table of Tables.....	4
Acknowledgments.....	7
Introduction	8
Why this study is important.....	9
My approach to this thesis.....	11
Thesis organisation	12
Chapter 1 Studying law and legal reform	13
Studying Law from a sociological perspective: “The science about something thoroughly non-scientific”.....	13
Chapter 2: Trends in Youth Justice	24
2.1 Youth justice in Western societies.....	24
From a welfarist approach to neo-liberal governance of youth crime.....	28
2.2: Youth Justice in Latin America	37
Pre 20 th Century developments	38
Child welfare	39
Legislative evolution	40
Early 20 th Century developments.....	40
Minors’ Acts period.....	43
Positivism	44
Child Welfare 1930s to 1970s	44
1950s and 60s	45
1970s to the early 1990s.....	46
Post UNCRC ratification	47
Child welfare in the 1990s	47
Consolidation of UNCRC.....	48
Concluding remarks	52
Chapter 3: Youth Justice Reform in Chile: Context, pre reform and main reform features.....	54
3.1 Introduction	54
3.2 The return to democracy and reforms to the justice system	55
Changes in the discourse about security and its relation with the Judicial System	64
3.3 Criminal Procedure Reform	67
3.4 A historical perspective on children's rights and juvenile justice in Chile	71
Legislative changes after the United Nation Convention on the Rights of the Child ratification.....	78
Chapter 4: Methodology.....	92
4.1 Introduction	92
Research questions.....	92
Plans and reality.....	95
4.2 Research strategies and research design.....	97
Mixed methods	97
Case studies as research strategy: Youth justice reform as case study.....	99
Units of analysis	103
Qualitative Data: History of the Law, annual presidential speeches, elite interviews and judicial files of young people in the youth justice system	105
4.3 Ethical considerations	109
4.4 Data analysis methods	111
Analysis of qualitative data	112
Typological analysis.....	113

Notes on Critical Discourse Analysis	117
4.5 Judicial files analysis.....	122
Information in young people's judicial files pre and post youth justice reform.....	123
Chapter 5: Youth justice reform origins.....	126
5.1 What ideas contributed to the changes to the juvenile justice in Chile?	126
Which positions can be found when debating policy changes in the Chilean youth justice reform?	129
What are the origins of the youth justice reform in Chile?	130
Which advocacy coalitions can be identified?	131
Coalition 0: Tutelary regime as the best way to approach youth crime.....	133
Coalition 1: Children's rights advocates/rights-based decisions	133
Coalition 2: Citizens' security advocates.....	138
5.2 Debate of the law in the Parliament: between penal populism and tutelary beliefs.....	145
Main topics in the Parliamentary debate of the Act on Adolescents Penal Responsibility.....	150
Concluding remarks	177
Chapter 6 Adolescents in conflict with the law in Chile: Approaches and evolution	180
The Minors' Act of 1967 and its treatment of young offenders.....	182
The structure of criminal procedure in practice	185
Situation before the implementation of the Act on Adolescents Penal Responsibility described using information from young people's judicial files.....	185
Situation after youth justice reform	207
Chapter 7: Conclusions	228
Research questions' answers and methodology	228
What did I learn about how to approach this type of study.....	231
My research process	234
Findings	235
Do we need further reforms?	241
Implications of this thesis	242
Bibliography	244
Legal documents	254
Appendix A. Pre and Post Reform Diagrams of Functioning	256
Appendix B Chilean Youth Justice Reform Milestones	260
Chilean Youth Justice Reform Milestones	260
Appendix C. Examples of judicial files contents pre and post reform	261
A "successful" case under the Minors' Act of 1968.....	261
Mobile phone theft under the Act on Adolescents Penal Responsibility.....	283

Table of Tables

Table 1 Minimum ages of criminal responsibility in Europe, the US and Canada	30
Table 2 Youth Justice Reform in Latin America and the Caribbean.....	49
Table 3 Maximum time of imprisonment for adolescents In Latin America	51
Table 4 Political parties in Chile (data 2011).....	59
Table 5 Country organisation and demographic characteristics	62
Table 6 Chilean electoral system details.....	62
Table 7 Old and new criminal procedures	71
Table 8 Arrests carried out by the police between 1990 and 2005.....	86
Table 9 Cases of prosecution that include young offenders	87
Table 10 Adolescents serving a sentence registered by the National Minors' Service 2009	88
Table 11 Adolescents serving a sentence registered by the National Minors' Service 2010	88

Table 12 Adolescents serving a sentence registered by the National Minors' Service 2011	89
Table 13 Adolescents in provisional custody and serving a custodial sentence	90
Table 14 Type of sentences being served between 2008 and 2011	90
Table 15 Reoffending rates by age	91
Table 16 Relevant situations for different research methods	100
Table 17 Type of offence in pre-reform sample of judicial cases	189
Table 18 Logistic regression predicting decisions in minors' courts	197
Table 19 Predicting decisions in court of appeals	200

Acknowledgments

I thank my supervisor, Professor Mike Hough and Professor Ben Bowling for their constant support during all this time. Mike was very kind to remain present even after leaving King's. I appreciate very much their patience despite many difficult moments.

Several people and institutions were important for the development of this piece of research. First of all I am grateful to the Chilean Council for Science and Technology (CONICYT) for funding that made this thesis possible.

The Chilean Ministry of Justice and the National Prosecutor Office help providing access to their data was crucial during my fieldwork. I also thank every actor interviewed for this thesis.

Finally I would like to thank my family and friends, old and new, and especially to those that departed during the time spent working on this research. I am very grateful to my brother Nicolás, my sister Susana, my good friend Marcela, my late cousin Eduardo and my Chris, my husband, who has been present and encouraging me during great part of this process, giving me the right reasons to keep walking (or should I say writing!).

Introduction

In broad terms, the inspiration for my work comes from inequality, distribution of power and conceptions of justice and the rule of law. I do not cover all these extensive topics in my thesis but all of them are present in some form through it.

When observing cases of young people in conflict with the law, it appears that commonly held views of justice can appear to be contradicted. A number of troublesome situations can be observed, such as the level of focus on a type of offender (poor, male, uneducated, from broken homes) and the limited types of offence that are brought to prosecution (these are mainly property offences). Also elements like limited access to legal aid (in the case of Chile this happened in particular before the youth justice system was modified) or the use of previous arrests or previous convictions as a form of evidence to prove that an offence had been committed appeared to contradict the law. In Chile for some years (2005-2007 after the reform to the Penal Procedure was put in place in 2005 and before the Act on Adolescents' Penal Responsibility was implemented) the idea that children should have special rights when confronting situations that would shape their future (as the UN Convention on the Rights of the Child prescriptions state) was not followed and this left a considerable number of adolescents under a system that contained fewer guarantees than the ones that were provided for adults. These kind of inconsistencies helped me to shape the main questions that guide my thesis, questions that were not totally original as I will discuss in chapter one.

I became aware of youth justice reform while studying for my sociology degree. I noticed that Chile signed the UNCRC in 1990 but reform did not happen for several years. Serious attempts to reform the system only took place about ten years after the treaty was ratified. When the reforms were finally implemented they appeared to be very much out of step with the

media view of the changes needed, and even contradicted what politicians had been saying. This raised some questions for me: if the reforms were an attempt to comply with the UNCRC, then why did they take so long and why did they differ from what was required in the UNCRC? Why was the media taking a view that youth crime was out of control, and any reform should be focused on tackling this? Who was influencing this policy?

Another reason for my interest in legal reforms came from the extraordinary times that I grew up in. I lived the first ten years of my life under a military dictatorship, and became interested in politics at a time of great change and uncertainty in my country. I was aware that the legal system of the country was still set up much as it had been under Pinochet and attempts to change it were vital for an effective and lasting transition to democracy, and would also be likely to cause great debate in Chile.

Why this study is important

Youth justice has been an area of law that has changed a great deal over time, and it has become increasingly specialised. The concept of children's rights is understood and accepted. In my study, I compare the features of youth justice systems against those of the adult systems and assess how these have evolved.

In Latin America the studies looking at aspects of youth justice have been traditionally carried out by legal scholars and have emphasised the legal aspects of the topic (Beloff 1999 and 2001, Cillero 2002 and 2005, Couso 2009, Duce 2009 and 2010, García-Mendez 1994 and 1998). In Chile there have also been studies examining specific parts of youth justice (Muñoz 2008) or describing aspects of the judicial procedure (Riego and Tsukame 1998 and Jiménez 2000). In the implementation area, Paz Ciudadana Foundation has been publishing comparative studies about the best practices of intervention since the 1990s, while the National Minors Service

publishes studies evaluating their own programmes and practices. Having explored these publications and also looking at the type of official information available I was able to find some gaps in the literature available for Chile. For example, the official information published by different government departments and institutions is not accurate and lacks of common variables that could make it comparable. This was one of the reasons behind my attempt of looking “inside” the system using judicial cases where young people were involved. Although the information from judicial cases is limited and leaves several important areas of the process in the shadows (for example, it does not say much about the interaction between authorities and adolescents in the courtroom) I found that analysing judicial files provided some information about the pace of the process and the reasoning behind decisions. It was very useful interviewing judges and heads of juvenile justice from the Public Prosecutor Office and the Defence to understand how the judiciary functions.

There are some articles describing certain aspects of the development of the Act (Cillero and Bernaldes 2002, De Ferrari 2006) but I have been unable to find any analysis of the process from a policy making perspective like the one used in this thesis (see Chapter Five). To an outsider, the process of changing an element of legislation appears to be simple. At a basic level, the government makes a decision, puts it into place and then the change happens in the real world. What may seem to be a simple change can in fact open a large number of questions, including:

- Why are the changes being made?
- Who is involved in making the changes?
- What are the objectives of the changes?
- What benefits will the changes bring?
- How will the changes be introduced?
- What effect do the changes have once introduced?

All these questions regarding the enactment and implementation of the Adolescents' Penal Responsibility Act in Chile are asked throughout this thesis.

My approach to this thesis

To take a detailed look at the reform of the Chilean youth justice system, I took an eclectic approach, analysing many different sources of data. I needed to be flexible with this as I encountered problems accessing some of the data that I had originally intended to use. Because of these problems, the questions I was able to answer about this subject changed over the course of my study. This was not a problem, because in reality, only a few key aspects of this reform could be analysed in detail, which I thought would be preferable to a superficial look across the whole of the reform. The most important sources of data for my study were:

- Interviews with key actors involved in the reform process and implementation of the Act
- The compilation of parliamentary debates
- President annual speech transcriptions
- Judicial case files from before and after the changes were implemented.

The main question I have answered for this thesis is:

- How has the Chilean youth justice system changed since the last reform?

With the purpose of delimiting this broad question, I stated secondary questions:

- Why reform to the youth justice system was considered necessary and how?
- What are the differences between criminal procedure in practice and the formal modifications made by law?

- What are the ideas and beliefs that guided the reform of the youth justice system?¹

Thesis organisation

After an examination of the ways in which the study of law has been approached from the social sciences and having explored concepts that will be used in the analysis of material in Chapter One, I look at the main trends in youth justice in the western world and assess the importance of the transference of ideas between countries since this has had considerable impact on propelling legal changes in Latin America and Chile (Chapter Two). Having established the general ideas that have guided the development of youth justice systems in the West in Chapter Two, I then describe the main contextual information about post dictatorial Chile and introduce a historical view of the way of dealing with young people in need and in conflict with the criminal law in Chapter Three. Chapter Four deals with the methods used in order to collect the material analysed in Chapters Five and Six. In Chapter five I give an account of the origins and originators of the Chilean youth justice reform, the approach used in order to do this includes the use of a tool to assess policy change called Advocacy Coalition Framework (Sabatier, 1987). In Chapter Six I resort to the analysis of judicial files and interviews with key actors in order to compare how the youth justice system has functioned before and after the implementation of the Act on Adolescents' Penal Responsibility. The conclusions of this thesis are presented in Chapter Seven.

¹ This question emerged and became more important for me during the course of my study, firstly when I had problems accessing data, and then once it was secured, realising that the lack of detail supplied meant it would not serve the purpose I had hoped.

Chapter 1 Studying law and legal reform

"(...) the responsibility of sociology is to remind us that, as Montesquieu put it, society cannot be transformed by decree" (Bourdieu, 1986: 840)

Studying Law from a sociological perspective: "The science about something thoroughly non-scientific"²

In this chapter I locate the topic of this work in a specific disciplinary setting and set the conceptual framework that guides and informs the analysis of data collected during my fieldwork and the discussion of findings in the subsequent chapters.

In order to place the main research question in a broad context I state which assumptions guide this study and I discuss different approaches to the study of law giving the reasons why I chose an empirical approach to study the recent Chilean youth justice reform.

My assumptions for this study include establishing that the relationship between law and society is an internal one and that law reflects in a great deal how power is distributed in society. To justify the election of this approach to understanding law, I describe the most common forms of studying law and discuss the suitability of using the concept of juridical field developed by Pierre Bourdieu as an appropriate perspective to the scope of this thesis. Relating the topic of legal reform to the concept of juridical field will help to understand how ideas coming from other fields (politics, economics, academic) struggle to influence the legal field.

² Lawrence Friedman in *The Law and Society Movement* (1986: 766)

Another topic of interest refers to the relationship between law and society. In this line the work developed by David Nelken about the “gap” between the law in the books and law in action will be discussed. This will be important for the understanding of youth justice reform as one of the first issues that call the attention when looking at the contents of the current Act on Adolescents’ Penal Responsibility of 2007 is the lack of internal coherence of aims within the law and the considerable gap between what is established in the law and how the youth justice system works in practice.

In the second part of the literature review (in chapter 2), I will discuss the main approaches to the study of youth crime and justice, highlighting the expansion of what is called “new punitiveness”, the traces of welfarist views that remain present in modern youth justice systems and the connection between these tendencies and children’s rights.

Internal vs external theoretical analysis of law

Law can be studied by several means and from different perspectives (see Friedman 1986 and Nelken 1980, 1984, 1986). One common approach is to analyse the law according to the “position” that the observer takes, either as an insider or outsider. Emphasis on the study of the symbolic aspects of law versus the study of law’s mechanisms and structure is another usual division (as discussed by Bourdieu 1986 and Althusser 1971). These approaches to studying law are labelled as external/internal perspectives. However, this dichotomy has not a unique meaning. The external approach can mean that the analysis is made by an external observer or that the theoretical perspective that the observer is using gives great importance to external aspects of law. In the case of internal views, authors can be talking about the meanings and intentions of the law or refer to the doctrine of the law as understood by lawyers and legal scholars.

In relation to the internal perspective, some authors argue that experts coming from the legal profession or legal scholarship tend to view and explain law from inside or on its own value through its own transformations (Nelken 1984; Bourdieu, 1986; Cotterrell, 1998). This internal point of view is the one typically related to legal doctrine and jurisprudence. Despite the advantages that an internal analysis may bring (which include deep knowledge of the field and its changes), the problem with this perspective is that it considers that law is hardly influenced or affected by external factors. The term from philosophy and legal theory that best summarises this approach is *formalism*. Formalists define law as a discipline totally autonomous from the social world. According to the Black's Law Dictionary, legal formalism is "the theory that law is a set of rules and principles independent of other political and social institutions" (Black, 2009: 977). One of the products of the formalist approach is the body of doctrine that legal scholars generate and study. Another characteristic of this approach is the identification of the history of law with the history of the development of its internal concepts and methods, again, independently from external events or constraints (Bourdieu, 1986).

The external perspective in the study of law is usually associated with what observers have to say about law. While social scientists have paid attention to the structural characteristics of law, philosophers of law focus on the evaluation of the moral aspects of law. As an example of the theories carried out from an external perspective Bourdieu (1986) mentions the instrumentalist theory represented by structuralist Marxists who, in general, give a marginal importance to the symbolic aspects of social life (aspects that they believe to have *relative autonomy*³ from the economy). Bourdieu (1986) mentions that the ideas of the French Marxist theorist Louis Althusser

³ The renewal of Marxist theory inaugurated by Louis Althusser and his associates in the 1960s had as one of its aims the rescue of Marxism from the charge of economism (or economic determinism). According to Althusser, the social totality consisted of four distinct sets of practices—economic, political, ideological, and theoretical—in complex combination among them. None of these practices should be thought of as reducible to any of the others. On the contrary, each has its own 'relative autonomy' within limits set by its place in the totality. Critics have argued that in the absence of any specification of what these limits might be, the concept lacks explanatory content. [Dictionary of Sociology (3 rev ed.)]

can help to summarise the structuralist perspective. Instrumentalism is the opposite of formalism. Under instrumentalism law is a reflection of the social world. Althusser's concept of "apparatus" contains the fundamental elements of the instrumentalist theory. Apparatuses are means or methods used by dominant groups to impose their will. Among the list of ideological apparatuses, Althusser includes the legal apparatus along with the family, schools, churches, politics, communications and cultural activities. What defines apparatuses for Althusser is their ideological service to the ruling classes, he argues that "no class can hold State power over a long period without at the same time exercising its hegemony over and in the State Ideological Apparatuses" (Althusser, 1971: 146).

Although internal and external perspectives have advantages, using only one of the approaches leads to different kinds of bias that one cannot ignore. On the one hand, the internal approach provides a detailed account of legal thinking by the means of works about jurisprudence, to mention one of its most known areas of study. While internal perspectives can tell a great deal about how law functions, they tend to ignore the relationships that law has with other social areas leaving this approach in danger of being blind to, for example, political or economic inputs and how they modify the ideal constructions of legal doctrine. External approaches can analyse in great detail the place of law in the social world and explain a considerable amount about what makes law useful and how is used by different social actors, but at the same time can oversimplify things, as we can observe in the analysis made by structuralist theorists.

Pierre Bourdieu offers an explanation which is alternative to formalist and structuralist approaches through his concept of "juridical field". A field is a sphere of life which has its own rules and relations of power. Actors in the field occupy specific positions related to their access to or possession of the forms of capital that are more important in the field. The possession of certain types of capital makes possible the entrance to a field. At the same

time a field is a space of struggle to preserve the capital distribution or hierarchy within it. A field is also characterised by its level of autonomy from external powers that could compete for the social space that the field manages. In Bourdieu's words, the juridical field is "the site of a competition for monopoly of the right to determine the law" (Bourdieu, 1986: 817). A field is defined by relations of power that give structure to the field and the conflicts of competence around the field and by an internal logic of functioning that shapes the possibilities of action inside the field. In the case of the juridical field the struggle consists in having the control over the right to define the law (see Bourdieu 1986: 816)⁴. Therefore, to analyse law understood as a field allows it to be made clear that the law is a constitutive component of social life that despite being relatively independent of external determinations is not isolated from the social world.

The concept of "juridical field" may sound similar to Luhmann's (1988) conception of law as a social system. Bourdieu argues that the difference between both perspectives lies in the emphasis that Luhmann gives to the self-reference of legal structures. According to Bourdieu, Luhmann's approach is still very close to the formalist way of understanding law due to the reference to law as a self-referential or autopoietic system. Luhmann himself did not think in the same way. He points out that the legal system is a sub-system of society as a whole despite the particular definitions that make the sub-system different. The basic feature that distinguishes the legal system from any other one is the power to dictate what is fair and what is not fair. This power works as a basic binary code that marks what is included and excluded from the legal system. In applying the concept of autopoiesis to the case of law, Luhmann tends to emphasise the self-referential aspect of the legal system because an autopoietic system is a system that *"produces and reproduces its own elements by the interaction of its elements"* (Luhmann, 1988: 137). Despite the levels of closure that any system requires

⁴ For a comprehensive development of the concept of field see "The field of Cultural Production", Pierre Bourdieu (1993). A very good introduction to Bourdieu's life and theory can be found in the work of his disciple Löic Wacquant, see particularly *"Pierre Bourdieu"* by Löic Wacquant in Rob Stones, *Key sociological thinkers*, 2006.

in order to function as such, Luhmann insists that talking about the relationship between law and society becomes a misconception as law is a “differentiated functional system within society” and like any other system is highly dependent on its environment and very independent when it comes to its specific operations (Luhmann, 1988: 138). When looking at law as a social system, it is argued that only law can define what is lawful (seen as a positive value) and unlawful (negative value) and to do so it uses its own mechanisms or operations (1988: 139).

The fact that law processes social conflict by managing normative expectations is a point made by Luhmann that goes in the direction of showing that law is not as isolated as it seems to be in Luhmann’s theory at first sight. Changes in autopoietic systems can be propelled by disturbances coming from the environment or by errors in the functioning of the system when “reproducing its own operations” in order to maintain its “internal consistency” (1988:146)⁵. Therefore, efforts to create a theory addressing the evolution of law should contain at least two elements for Luhmann. First, it should take into account what problem or problems push for a specific development of law in the general social context. Second, such a theory must consider the elements that allow the existence of the system if considerable changes occur (1998:146). Luhmann reaches the following conclusion about the evolution of law: “there was a time when religion was used as justification for law in name of tradition. Nowadays religion does not have that power in Western world. If law used to anticipate conflicts and give a manner to solve them, today law regulates behaviours that can be conflictive and therefore law is less stable than in other moments of its evolution” (1988:148).

Interpreting law and analysing its evolution from a point of view that goes beyond partial or extreme positions allows the introduction of elements that shape law and therefore are part of it but can be seen as disregarded as

⁵ For Luhmann the internal consistency of autopoietic systems has more importance to the maintenance of the system than the struggle to survive because of problems with the environment.

external by legal scholars whose concerns are focused on jurisprudence or the formal aspects of law. Similarly, the exact opposite, the instrumentalist approach, tends to ignore several aspects of functioning law. Regarding law as a fundamental aspect of society (even if it is considered a field or a system) is a way of conciliate the valuable aspects of internal and external perspectives.

These problems have also been studied under the labels of law and society and socio-legal studies. Cotterrell points out that one of the contributions of sociology to the study of law has been studying “inquiries peripheral or even external to law as lawyers understood it” (1998: 172).

The struggle has been to achieve a status of relevant actors with a say on legal understanding. This struggle is closely related to legal scholars thinking of sociology as a discipline that cannot reach the core of law and in this sense sociology of law has held for a long time an outsider role. According to Cotterrell “opponents of legal sociology hastened to dismiss it as unable to speak about *law* at all; fated to remain forever ‘external’ and thus irrelevant to legal understanding” (1998: 173, author’s emphasis).

Although works that look at law socially can be traced back to early Greek philosophy, the law and society “movement”⁶ started in the mid Nineteenth Century with works by Maine and Weber. Friedman (1986) points out that the origin of the movement is based on two modern ideas. First of all, the idea that law is made by people instead of coming from other instances like religion, and second, the idea that law varies according to time and culture, instead of being immobile. Without these changes in understanding it would not be possible examine law from the perspective of the social sciences. A

⁶ Denominated as a “movement” rather than a discipline because its limits are not well defined and some authors would even doubt of its proper existence as a movement. Even Lawrence Friedman in his account of the “Law and Society movement” recognises that this sub-discipline does not have a “normative program of its own” (1986: 765).

problem of legitimacy arises along with modern ideas and effectively law nowadays has much more pragmatic justifications and uses than in the past.

Lawrence Friedman defines the law and society movement as “the scholarly enterprise that explains or describes legal phenomena in social terms” (Friedman, 1986: 763). Also it can be defined as the study of the relationship between two social phenomena: legal and non-legal. The definition is very wide and can include perspectives from different disciplines and research that can be made using rather different methods. Therefore, what makes it different from anyone adding political, social or economic elements to their analysis of law? The main particularity is the systematic approach and rigour in method and theory that the law and society movement imprints into research and the non-judgemental approach that is used despite the high moral content that characterises law⁷. According to Friedman, the object of study is *living law* or “how law actually operates” (1986: 764). Law is primary a system of values and at the same time a group of elements to solve certain real life problems and this is reflected in the way that law works and in the way in which people think about law and use it in their everyday life.

According to Nelken (2001) law and society and sociology of law perspectives have been in tension because they seek to establish the “truth about law”. The point is that law functions with its own truth which contains a particular way of interpreting the world and generating knowledge for legal purposes (both characteristics discussed by Bourdieu 1986 and Luhmann 1988). This helps to support a common idea among lawyers and legal scholars interested in doctrine: that law could not be studied by outsiders or understood using extra-legal categories. But norms exist beyond ideals which could be either political aims or part of legal doctrine. According to Deflem (2008), the study of law as rules and practices is always oriented

⁷ And this is one of the reasons why the sociology of law or the law and society movement do not tend to give strong opinions about law’s doctrine. Some struggle can be observed about discussing the “truth of law” though (for example in Nelken 1984, 1998 and Cotterrell 1984, 1998). It also can be argued that no academic carries out research being “value free” and in the social sciences there are several examples of questioning the role of law as a form of social control instrument.

towards the factual aspects of law. These tensions between the factual and ideal aspects of law conform what Nelken (1981) denominates the “gap” between law in books and law in practice, a topic that has been of interest to socio-legal scholars for long time.

McBarnet suggested that the gap was rather within the law, between its rhetoric and its substance. The line of enquiry followed by McBarnet is related to ideology, particularly how ideas about civil rights can be maintained despite the gap between rhetoric and how law works in practice. Her proposal looks at the influential groups that create and guide the enforcement of law in order to “bridging macro issues and micro methods” together as a method of studying socio-legal themes (2004: xiv).

McBarnet points out that one problem of the traditional analysis lies in the use of a series of “questionable dichotomies” when examining the law and its practice. These dichotomies are varied and include setting against theory vs. empiricism or the substance vs. the administration of law.

More specifically, the tension between the ideals of the due process and the practical need for crime control has also been studied as a dichotomy as it was shown in the seminal work carried out by Packer in the early 60s (see Packer 1964). Despite the criticism of this way of seeing the problem of the gap between the formal and practical aspects of law, the work by Packer has been an important starting point and one that still provides insight into cases like the reform analysed in this thesis. For McBarnet one can expect a gap between practice and ideals as something obvious, the question that she explores covers the extent that the theory-policy gap “is inevitably tied up in the practical problems of the court and how far those problems could be met by alternative means without unacceptable side-effects” (2004:9).

This author mainly criticises the lack of attention to legal structure. According to her the idea that “formal rules are organised around civil rights” has been usually seen as a fact by both the critics and the supporters of the status quo. In practice the elites (like judges and politicians) use the rhetoric of civil

rights and due process but at the same time create rules of law enforcement that are in line with a crime and order set of ideas. In this sense, the law contains internal contradictions that would be mainly ignored, resulting in a practice of “due process is for crime control” (2004: 11).

In summary, the issue raised by McBarnet does not only questions the gap between the law in books and the law in action, but also goes a step further, questioning the law itself. McConville et al. (1991) criticise McBarnet's assertion that the rhetoric of law is external to the law and that the rhetoric of law is about civil rights expressed through the due process. McConville et al. argue that McBarnet commits the same error that she criticises leaving the rhetoric of law as something unproblematic and if her logic is followed it would make it necessary to interrogate the rhetoric of law as well. McConville et al. follow Nelken's criticism of the positions that locate the rhetoric of law outside the law because this view “ignores the argument... that ‘rhetoric’ serves as the sources which can generate or limit legal rule-making even though it does and cannot function in the same way as rules” (Nelken, 1987: 151 quoted in McConville et al. 1991: 178). To this core criticism, McConville et al. add that there is an alternative rhetoric of law that is also for crime control, for example, that police intervention aims to avert social damage, that the right to silence can be seen as the first resort of the guilty or that people should be treated differently depending on the risk that they, allegedly, pose to the public. In summary, the rhetoric of law also can be, and in general is, holding contradictory principles that manifest in principles, laws and practice.

The implications of taking a socio-legal approach to address the research questions posed in this thesis (which are analysing the policy making process of law reform and identify the gaps within the law and between law and practice) lie in at least two aspects. First, assuming that law is not a closed system is the first step to approach it as an “outsider”. Exploring the circumstances in which certain fields of law are modified and who participates in this process is the baseline to then question the law and its application.

In the case of the Chilean youth justice reform we will see that several of the problems or contradictions described in the literature can be observed. To mention one aspect, the internal contradictions of the law which locates crime control goals alongside social reintegration aims create a situation where neither aim is totally achieved. As punishment is not generally effective as a crime control tactic, and the measures orientated towards social integration are in practice ambiguous and underfunded, the changes that the law can actually achieve in this case are destined to be modest or non-existent. Also we will see that McBarnet idea that the judiciary and politicians actually use the rhetoric of rights while at the same time approving or promoting laws that seem closer to crime control aims was something that happened during the parliamentary debate of the Act on Adolescents' Penal Responsibility.

These problems suggest that changes in the law are not enough to create changes in the practical application of law. This is the gap that has the most serious implications in this case as, at the end of the day, the youth justice system deals with people who are supposed to be protected by special rights, whose future lives as adults can be seriously damaged by decisions taken over them. Probably the main lesson from looking at the law and its results in action is the one quoted to open this section: "society cannot be transformed by decree" (Bourdieu, 1986: 840).

Chapter 2: Trends in Youth Justice

This chapter gives a general overview about youth justice systems in Western societies since the appearance of the first youth or juvenile courts and the implementation of specific measures related to children and young people involved in criminal offences. It also defines the main concepts developed to explain youth crime. These concepts will appear in the analysis of the Parliamentary debate where the Act on Adolescents' Penal Responsibility was discussed. Reviewing these topics will allow to put in context the findings presented in chapters 4 and 6 where several aspects correspond with developments first occurred in developed countries such as the pressure for harmonise local law with international treaties in a context of increasing perception of high levels of crime and penal populist views.

The first section of the chapter deals with the characteristics of the youth justice systems in western societies and discusses the possibility of convergence in national policies related to youth justice among Western and westernised countries. The second section describes the main characteristics of youth justice systems in Latin America as a form of introducing a basic context which will allow a better understanding of the next chapters. Finally, an outline of the main concepts related to the topic is presented.

2.1 Youth justice in Western societies

In order to locate the subject, I will begin by looking at the main features of youth justice in Western societies and I explore the ideas related to policy transfer between the West and Latin America. We will see later on that several concepts have been imported into the Chilean mainstream understanding on crime and how the politicisation of crime related issues has played an important role in crime control.

Several authors have contributed with evidence of convergence in the ideas about crime explanations and crime control⁸ and policy transfer. Convergence and homogeneity are frequently taken for granted despite the complexities of determining their actual existence and the lack of compelling empirical and theoretical work about convergence of policies in a comparative perspective (Newburn and Sparks, 2004: 3).

Looking at what is done in different places and importing ideas and models of action is not something restricted to current times although it can be said that since the 1990s, the speed and scope of transfer has increased (in part because technology makes it easier for policy makers to learn about developments occurring in different places). A comprehensive definition of what policy transfer involves is given by Dolowitz and Marsh and refers to "knowledge about policies, administrative arrangements, institutions and ideas in one political setting (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political setting." (2000: 5).

The aim of this section is to show which concepts and ideas originating in Europe and the US have influenced Chilean rhetoric, policies and practices about crime as these elements will reappear in the analysis and discussion of findings. For a start it is worth mentioning that the origins of criminology in Latin America have been linked closely to foreign developments. The roots of the local version of the discipline are in Europe and it is generally said that we have a lack of proper local views to study crime (Del Olmo, 1975, 1999). This tendency to import forms of crime control have not been limited to the study of crime and criminals but also can be seen in the legislation, for example, the first Penal Codes in Latin America were enacted during the

⁸ Probably the most important work about convergence of crime control practices and ideas is Garland 2001. See also Nelken (2004, 2009), Friedman (2003) on legal cultures and law transplantation, Newburn and Sparks (2004) and Wacquant (1999) on crime control exports, Dolowitz et al. (1999), Dolowitz and Marsh (2000) on policy transfer..

nineteenth century and were strongly inspired by the Spanish Penal Code⁹ in first place, combined in some cases with French and Italian elements. Therefore, policy transfer has a relatively long history in Latin America, which makes relevant the inclusion of a brief description of ideas and policies that are shared with developed countries that are either used to describe or solve practical problems related to crime.

Policy transfer has at least two origins: voluntary or compulsory. Voluntary policy transfer includes the knowledge acquired by politicians and policy makers when travelling to other countries with the aim of seeing what policies are in place. Also international organisations collaborating with local governments (as it is the participation of the Organisation of American States and the German Agency for International Cooperation in the case of the reform to the criminal procedure in Chile) and professionals studying abroad bring ideas from other places. On the coercive side are international treaties and interventions by institutions like the World Bank or the Inter-American Development Bank (IDB). This brings to the discussion a question about policy transfer posed Newburn and Starks (2004: 4): “who is involved in the transfer of ideas, policies and practices?” There are a number of actors and institutions participating in the exchanges, for example, politicians, parties, Governments, pressure groups, think-tanks, experts, academia and NGOs among others.

It is also relevant to ask what is actually being transferred (see Newburn and Sparks, 2004). There are two main elements that are transferred: on one side, policies, practices and techniques, and on the other side, symbolic content (which can result in actual changes of policy as well). In the case of youth justice Nelken and Field (2010) suggest that the idea that there is a general “punitive turn” in youth justice is something that can be seen mostly

⁹ Rosa del Olmo (1999) points out that the Penal Codes that resembled the Spanish Code in greater extent were the ones from Perú (1863), México (1863), Venezuela (1871), Chile (1874) and Costa Rica (1880). She also considers this quite paradoxical as the Independence from Spain was obtained only at the beginning of the nineteenth century (Del Olmo, 1999: 24).

at a rhetoric level while practices remain close to the legal cultures of the countries, at least in their comparative analysis of England and Wales and Italy.

The origin of the policies is worth considering too. In the case of Latin America, policies are imported from Europe and the U.S. In the global panorama American policies and ideas about crime control have had predominance in the Western world (as has been discussed by Garland 1996, 2001 or Wacquant 1999). Although the influence of ideas initiated in the US is widely recognised in the literature, it is necessary to be careful about the extent of this. Local socio-political conditions, legal cultures and local problems will shape the form that ideas are introduced into different countries and here is precisely where comparative research stands. At this level there are at least two issues to consider. Firstly, the tendency to pay more attention to convergence than to diversity of the processes and results of policy transfer. Also the inclination to assume success of the transferences when in many cases the result is a failure of implementation of imported policies (see Dolowitz and Marsh 2000 for a discussion on policy failure).

Having mentioned these elements of general context about sharing ideas and practices, it is necessary to refer to the development of youth justice in the West. Western countries have experienced several concordant tendencies in the youth justice field for at least the past 40 years. I rely heavily on the work developed by John Muncie to describe the path followed by the UK (and in general the West) in youth justice. After this description, I discuss a series of concepts found in the literature about youth justice explanations and answers that are considered in the subsequent analysis of the Chilean case.

From a welfarist approach to neo-liberal governance of youth crime

The differential treatment received by adolescents in the criminal justice system is something relatively recent in history. Before the establishment of the first juvenile courts, adults and children found guilty of offences were treated under the same laws and were confined to the same prisons, although generally sentences for children and adolescents were shorter as age was considered a mitigating factor even before the creation of special courts¹⁰. In this sense Platt (1969a) talks about “the invention of juvenile delinquency” when referring to the times in which the first courts were installed due to the pressure of groups (the “child savers”) that argued that children should not be treated in the appalling ways that could be observed in the adults’ prisons.

Viewing youth crime as a separate phenomenon from adult crime was not a mainstream idea until the beginning of the Twentieth Century. In fact, the separation between categories of childhood, adolescence and adulthood only became the normal idea in modern times and nurturing treatment started to develop slowly¹¹.

During the nineteenth century, reformatories (1854 in England) and houses of refuge (in 1820 in New York and Pennsylvania) were opened in the UK and the US. These places were created as an alternative and less cruel form of punishment in comparison to corporal punishment, mutilation and death. By the end of the nineteenth century, reformatories started to be criticised and reform advocates tried to influence policies about young offenders’

¹⁰ Until the end of the nineteenth century under English Common Law (also in use in the US) children seven years old and younger were considered incapable of criminal intent and between seven and thirteen were presumed innocent. They started to be treated as adults at fourteen.

¹¹ According to Ariès (1965) the idea or concept of childhood as we know it was developed only after the Middle Ages. Until then children were treated and pictured as “miniature adults”. Ariès has been criticised for analysing the past according to canons of the present and backing his claims with works of arts ignoring how subjective those works can be but the importance of his work is unquestionable. His main argument-that the concept of childhood is related to cultural and historical context- has been used as base for further development of the field.

treatment. Reformatories were perceived as similar places to prisons where corporal punishment was common and the results of keeping children there were highly ineffective as criminality was not stopped and youngsters were not rehabilitated by being locked in those institutions.

In this context reformers appeared on the scene. They were strongly against the way in which society treated the most disadvantaged, including prisoners, the mentally ill, children in need and young offenders. Platt (Platt, 1969b, 2009) argues that the humanitarian ideas that moved “children savers” (mostly women from the elite and middle-class intellectuals) were probably less benevolent than it seems. In Platt’s words, in the US “The child-saving movement tried to do for the criminal justice system what industrialists and corporate leaders were trying to do for the economy— that is, achieve order, stability and control while preserving the existing class system and distribution of wealth.” (Platt 2009: 10). Child savers were a “conservative and romantic movement” which tried to implement forms to supervise and control adolescents, “inventing” categories of misconduct that were managed in a less formal form previously (Platt, 1969b: 21).

The beginning of youth justice systems can be traced back to the creation of the first juvenile courts by the start of the twentieth century¹². After the first juvenile courts were created the tendency has been to establish separated systems for adults and adolescents in the majority of the Western countries (there are exceptions such as Denmark and Sweden where there are not separate courts for young people). In the West, laws that reflect the belief in differential treatment of young offenders in respect to adults are shared by every country (Doob and Tonry, 2004). There is a common understanding that children require and deserve a system of justice that recognises their state of development and their lack of understanding and appreciation of the consequences of their acts (although views have been hardened since the

¹² The first juvenile court was established in Chicago in 1899 (Platt, 1969a). In the UK the start of a differentiated youth justice system is marked by the enactment of the Children Act of 1908 which created the first juvenile court in England and Wales.

1990s, which has been called a "punitive turn", see for example Fionda, 1998).

What differs is how treatment of young offenders works and for this reason it is important to look at the functioning aspects as well as the formal features of youth justice systems. For example, in the cases of Denmark and Sweden the lack of juvenile court does not mean that the young people are treated in the same way as adults (Doob and Tonry, 2004). One aspect that varies widely between countries is the minimum age of criminal liability, as can be seen in table 2.1 below.

Table 1 Minimum ages of criminal responsibility in Europe, the US and Canada

	Country	Age
Europe	Switzerland	7
	Northern Ireland	8
	Scotland	8
	England and Wales	10
	Greece	12
	Ireland	12
	Netherlands	12
	Turkey	12
	France	13
	Austria	14
	Germany	14
	Italy	14

	Denmark	15
	Finland	15
	Iceland	15
	Norway	15
	Sweden	15
	Poland	16
	Portugal	16
	Spain	16
	Canada	12
The United States	Connecticut	15
	New York	15
	South California	15
	Illinois	16
	Louisiana	16
	Georgia	16
	Texas	16
	Massachusetts	16

Source: Fionda (2005)

Muncie (2004) argues that until the 1970s, the discussion about youth crime was based on the advantages and disadvantages of punitive and welfarist approaches. Lately there has been a shift towards discussing topics emerging from globalisation and neo-liberal values, for example the

importance of individual and community responsibility preventing crime

From Muncie's work, we can conclude that the decline of welfarist practices in the youth justice systems is not only due to the excesses committed under it¹³ but a more complex explanation can be found if we look at the diminishing size of the state and the reduction of some redistributive and welfarist elements in other areas such as health, education and unemployment. These changes are related to the approaches made popular by the Reagan and Thatcher governments of the early 1980s that encourage individual responsibility and reduced state intervention. Muncie also suggests that the level of independence of states in a globalised context diminishes and the policies that get more attention are the ones related to favour the mobility of capital and attraction of foreign investment. There have been as well several changes in international law and acceleration of policy transfer which has resulted in convergence of criminal justice policies (Muncie, 2004: 154).

Muncie (2005) suggests that a way of understanding the period between the 1970's and 2005 is using the concept of globalisation defined as the existence of "uncontrollable economic forces which have come to shift power and authority away from communities and nations and towards 'external' transnational capital." (Muncie, 2004: 153). But in general this is understood as Anglo-Americanism. During the period analysed, a movement from penal welfarism to a model concerned "on the offence rather than the offender" has occurred. Muncie (2006) puts forward three "global processes" that have taken place in the period analysed:

1. Since the 1960s penal welfarism has given ground to neo-liberal forms of governance. This process has been characterised by the decrease of the social role of the state that, in the criminal field, has been expressed

¹³ Welfarism is constantly criticised for fostering people's dependence on the state and limiting individual responsibility of individuals for their own wellbeing and behaviours (Muncie 2004: 155).

as fewer protection measures and less importance given to social background of offenders. In this context, the measures gradually started to be aimed at the individual, families or communities (Muncie, 2005: 37). In youth justice, Muncie identifies six main topics shared by many Western countries:

a) Diminution of welfare. In youth justice systems there was confusion between punishment and welfare for long time. On the pretext of protecting children involved in criminal offences, disproportionate restrictions on the liberties of young people have been imposed (disproportionate in comparison to penalties imposed for similar offences for adults). In that way, youths were punished for their social and economic backgrounds and for their offences. In the 1970s a group of lawyers and social workers promoted reforms to this situation arguing that it was necessary and fair to punish the crime and not the person. The success of the reformers was reflected by a series of reforms in several countries at the end of the 1970s.

b) Adulteration. According to Muncie, during the 1980s a discourse that emphasised 'individual responsibility and obligation' became dominant (2005: 38). The adulteration of the youth justice (eliminating special judicial procedures created for young offenders' protection from the stigmatisation of adults' procedure and giving adult punishments to young people) had a huge impact on American juvenile justice. The centre of attention changed from the offender to the security of the public. The abolition of *doli incapax* in England and Wales in 1998 and the Canadian reform in 2003 (which emphasises 'tough on youth crime' measures and give the option of applying adult punishment to people of 14 years and older, see Smandych 2006) are clear examples of adulteration in youth justice (for minimum ages of criminal responsibility in Europe, USA and Canada see Table 2.1 above).

c) Risk factor prevention. This topic is the most related to social class amongst the themes identified by Muncie (2005). The measures linked to risk prevention have as an objective to control the "potential for harm, disorder and misbehaviour (rather than crime itself)" (2005: 39). The main risk factors mentioned by Muncie are hyperactivity, large families, and poor parental supervision. It is discussed that risk prevention puts premature labels on the children to turn them in to targets of intervention that criminalise their social origin.

Farrington (2003) is a key author in this topic, his seminal longitudinal work aiming to predict offending has been crucial in the understanding of the possible causes of crime and therefore, finding which risk factors are the most prominent predicting offending.

d) Responsibilisation. It is not only young offenders who have individual responsibility for their offences; everybody has responsibility to reduce crime. The direct actions of the government in crime control, through the justice system (police, courts, prisons service, etc), are shared with local actors. The principle of 'active citizenship' is behind the community responsibility for crime.

e) Actuarial justice. Muncie describes this topic as the progressive inclusion of target-based measures, for example cost-effective, in order to improve youth justice systems in Western countries. The criticism of this has to do with the prominence of technical responses aims at the loss of policy objectives.

f) Penal expansionism. This topic refers to the increase in imprisonment witnessed in many Western countries. On one hand, this expansion has stimulated the interest of private companies in providing services related to penal systems (especially prison building and control technologies),

who have become increasingly active in lobbying governments on this. On the other hand, imprisonment has become a way of controlling socially excluded people, in a process that has been denominated as 'penalisation of poverty' by Loïc Wacquant (2002).

2. Muncie mentions transfer and convergence of crime control policies as a key issue in the changes suffered by youth justice systems in recent years. This process is characterised by the effort that countries make for finding and importing successful practices on crime prevention ('what works'). American penal policies such as some features of 'zero tolerance' have been applied in places like France, Australia, Germany and Ireland. Muncie points out that policy transference is not in one direction and is not standardised. There are significant differences among countries in the process of implementation of similar imported policies (2005, 44-45). The implementation of foreign measures cannot be made in the same way in which it was made in the country of origin; there are different social, political and cultural contexts along with national traditions that cannot be ignored if the success of those policies is expected.

3. Simultaneously, international law and treaties have influenced policy convergence in youth justice. The UN Convention on the Rights of the Child (UNCRC, 1989) has been important in the creation of international agreement about fundamental children's rights. This consensus is demonstrated by the means of the signature of the Convention by all countries with the exception of Somalia and the United States. The UNCRC establishes that all the children have "right to protection, participation, personal development and basic material provision" (Goldson and Muncie 2006: 211). Although many countries have modified their legislation and implemented policies directed to improving conditions for children, children's rights' observance is not carried out by all the countries that have signed the agreement. The UNCRC establishes specific rules related to youth justice, being the most important the use of imprisonment only as a last resort

measure. In case of liberty deprivation, special needs of the child have to be considered and their dignity respected. Currently, thirty-three countries have made reservations to the UNCRC ratification, among them; Canada, Netherlands and United Kingdom have reservations to the obligation to the letter c of the article 37 which stipulate that "every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so". In many countries a discourse that emphasises the adherence to the UNCRC coexists with policies that raise inequalities and establish tough punishments for children.

Nonetheless, global processes described by Muncie (2005) have not resulted in a global response to youth crime but some tendencies can be identified. From the 1990s, changes in the legal frameworks of treatment of young offenders have been related to a general tendency towards giving an increased role of crime issues in the media and public opinion fields (Roberts et al, 2003; Roberts & Hough, 2005; Cillero y Madariaga, 1999; Wacquant, 2002). This concern, which is also observed at scientific and political level, places youth offending as one of the main troubles that modern societies must face, because although the perceptions about proportion and number of youth offenders and the type of crime they incur are generally overestimated, the public alarm has political effect and is reflected in punitive laws and policies (Roberts et al, 2003).

Thereby, youth justice has been a target for public policies that could be classified as penal populist policies (Roberts *et al.* 2003; Roberts and Hough, 2005). Amid the measures taken by several Western countries in recent years the following examples could be found:

- transferring cases of young offenders to adults' criminal courts;
- lowering the age of criminal liability;
- reducing restrictions on exposing names of young offenders in mass media;
- making sentences longer, and using custody more frequently.

These tendencies, especially the imposition of harder punishments, are accompanied by public ignorance about the kind of offences committed by young people and the treatment that adolescents receive in the criminal justice system (Roberts and Hough, 2005). For example, in Australia, Canada, New Zealand, England and the United States, people perceive that youth crime has risen, not only in the rates of quantity of crime, but also in seriousness. People believe that nowadays children are able to commit the worst forms of violent offences (Roberts *et al*, 2003) and the fact that the offenders are children and therefore different to adults is many times omitted, as Julia Fionda put it when analysing the Bulger case, during the 1990s, “major judicial decisions and reformulations of policy have in common an almost stubborn blindness towards the incapacity of children” (Fionda, 1998: 1).

The UNCRC and policy exchange among Governments with similar political backgrounds (and beyond) has led to a convergence of youth justice policy around the world in the last 40 years. However, there are still many differences between countries due to such factors as differing implementations of similar policies and a varying public perception of youth crime in each country.

2.2: Youth Justice in Latin America

In this section I explore developments in youth justice in Latin America chronologically, examining changes across history and the main events that influenced the major changes. I will look at the main changes to legislation and punishment, and show how changes in government welfare policy impacted on those developments.

The history of youth justice in Latin America has not been examined in detail. There has been few people dedicated to its study and they have been mainly lawyers associated to international organisations or universities. In this

section I will rely on the work of Emilio García Méndez, one of the most influential lawyers specialised on this field. As the history of the treatment of young offenders has been closely related to the history of children in need of protection I will look at the categorization made by Francisco Pillotti (1999) about the evolution of institutions dedicated to children's protection in Latin America. Also I will review the systematisation of changes in minors' legislation in America Latina made by Cillero and Madariaga (1999).

Pre 20th Century developments

García Méndez (1990) describes three stages in the development of socio-penal control of children and adolescence in Latin America:

a) Pre-Columbian period: There is no evidence about how young offenders were treated before Spanish and Portuguese colonisation was carried out at the end of the fifteenth century.

b) Conquest: From colonisation until the end of eighteenth century the treatment of young offenders was no different to the treatment given to adult offenders. The same norms and same punishment were applied to children, young people and adults.

c) During the nineteenth century a separate system for children and young people prevailed and new penal codes were written. The discernment process was established, and the detention of adults and minors in the same places was prohibited. However, this ban existed at a formal level only; in reality young people were imprisoned alongside adults until recent times.

García Méndez (1990) has located the beginning of the history – as distinct from the pre-history – of youth justice around the middle of the 19th century. In that period an incipient reform movement gained strength. This movement

opposed the placement of children in adult prisons and the terrible conditions in which children lived there. This movement was consolidated with the establishment of the first juvenile court in Illinois in 1899.

Child welfare

The era from colonial times until the early 20th century was characterised by Pilotti (1999) as a period of "charity and philanthropy". Its characterisation is explained by the nature of the institutions dedicated to childcare at that time which were supported by Catholic religious groups. Usually they were located around or in hospitals and were financed by charity. These institutions received not only orphaned children but also sick people, elderly people, vagabonds and people with mental health issues. The majority of these religious congregations were run by European missionaries who attempted to evangelise and educate both poor and indigenous people.

From the nineteenth century until the first decades of the twentieth century, liberal ideology and an anti-clerical climate of opinion developed in Latin America. This situation was associated with the concern that emerging states attached to child welfare. At that time the concern was more rhetorical than real, because of the limited ability to achieve any real solutions. In practice, religious congregations remained the main providers of child welfare.

Gradually during the 19th century new actors became involved in child welfare. Political and economic elites began to be interested in the subject and tried to have more influence, especially intellectuals and professionals such as doctors and lawyers whom imported the latest advances from the developed world (individual positivism first and the sociological approach later).

Legislative evolution

Cillero and Madariaga (1999) analysis of legislative evolution shows that during the post-colonial to early 20th Century period, there was an absence of special legislation related to children and young people. In this period, legislation referred only to some differences between adults and children, in particular establishing that children lack adult abilities, which place children in a subordinated position in front of adults that had the authority over them.

The first juvenile court (1899)

The creation of the first juvenile court in Illinois in 1899 affected not only European developments but also those in Latin American youth justice systems. This juvenile court marked the start of separate treatment for children and adolescents in justice systems (Platt, 1969) around the Western hemisphere.

Until that moment, the treatment of young people accused of criminal offences in Latin America was in general limited to reduced sentences, relative to adults (usually one third of adult sentences). The sentences in general consisted of imprisonment, and adults and minors were jailed together. García Méndez (1990) describes the period previous to the creation of the first juvenile court in the USA as the "prehistory" of socio-penal control of childhood and adolescence.

Early 20th Century developments

One of the most important events of this period was the first International Conference of Juvenile Courts of 1911, held in Paris. This can be considered as a crucial event because it identified a series of issues about the treatment that children and adolescents receive in youth justice systems that are still

relevant today. According to García Méndez (1990) it was at this conference that the idea of abolishing the distinction between children and young people in need and juvenile delinquents begun to be discussed. As it was discussed above, the confusion about when and how the measures used have to be oriented to the protection of children and when they are focused on their punishment is still a problematic topic in several countries' legislation. This situation was even clearer at the moment of the 1911 Conference when children in need and young offenders usually received the same treatment. The main topics argued in the Conference were:

a) The question for the necessity for and the appropriateness of a specialised youth justice system. Simultaneously, concerns emerged about the reduction of juvenile crime: What are the principles in which courts should rely on? What are the most effective ways of tackling youth crime?

b) Around the date of the Conference the voluntary or charitable sector acquired a growing role in handling both children in need and young offenders, raising the question about the role of these institutions in relation to the juvenile courts and the state.

c) The function that courts have to play after the imposition of punishment or protection measures. In this sense questions emerged, such as: Have courts played a role in controlling the implementation of the sentences? What is their role in relation to probation?

Additionally, two powerful ideas were developed out of the 1911 juvenile courts conference. On one hand, concern about the growth of youth offences emerged; this fact helped to give Youth Courts a central role in the "fight" against youth crime. On the other hand, it was widely accepted that judges needed sweeping discretionary powers that rendered the adversarial process of accusation and defence as something unnecessary in youth justice

systems. The latter point became fundamental in Latin American systems, commonly criticised for the wide discretion enjoyed by judges.

It is remarkable that these problems still have a considerable relevance in many countries including Latin American ones, in particular, the question about the best approaches to reducing crime rates, the place of agencies outside the state and the role of the courts after sentencing.

Reforms: 1919 to 1939

The poor living conditions and abuse suffered by young offenders in adult prisons created concern and were one of the main reasons for subsequent reforms. Between 1919 and 1939 every Latin American country amended its legislation relating to children in need and delinquents. New legislation permitted Latin American states to do anything that was "necessary" to control these groups of young people.

Regardless of new legislation, Latin American youth justice systems were still characterised by failing to guarantee some basic conditions for the majority of the population, particularly health services and education. The Youth Courts Judges (Judges of Minors) were in charge of determining disposals by the state for young offenders or young people with problems such as being abandoned by their families or in case of being victim of mistreatment. The judges had to operate "*in loco parentis*"; the law stipulated that the judge must act in first place as a family father and not necessarily guarantee justice in his decision-making.

Despite the differences among Latin American countries we can analyse the development of those national systems for managing juvenile crime and children in need as a whole because there are several trends shared in their development.

Minors' Acts period

Cillero and Madariaga identified the period between the early Nineteenth Century and the ratification of the UNCRC in the early 1990s as the "Period of Minors' Acts". The laws enacted in this period were characterised by emphasising protection of children in need of protection. The first Latin American country which established a system of justice and care for children was Argentina in 1919.

According to Cillero and Madariaga (1999: 36) the most important features of legislation attributes during the "Minors' Acts" period were:

- Laws were focused on children that were not socially integrated. The subjects of these laws were defined as children living in abnormal circumstances ("situación irregular") a phrase or concept that has an ambiguous meaning, and could be interpreted as being disadvantaged or acting outside the law. That sentence confirms the confusion in the use of same treatment or measures in cases in which children need protection or in cases in which children commit criminal offences.
- In the acts passed into law during this period the state had full control over children's protection and this was used as a way of social control.
- Minors' Judges had wide and discretionary powers.
- Minors' Justice was considered autonomous in the context of the judiciary. This fact allowed the penal and procedural guarantees enjoyed by adults to be ignored.
- In Minors' Acts children were considered as people in need. In this context they did not have rights and, consequently, legislation ruled and reinforced adult's authority over children.

Positivism

The early 20th Century is characterised by the development and subsequent hegemony of the positivist point of view in the social sciences. Under the positivist approach the emphasis is on offender's behaviour. People behaving against norms are classified as abnormal; they could not choose how they behave because they would suffer from some kind of pathology. Consequently, the solutions taken with the purpose of decreasing crime rates were medical rather than penal (Muncie 2006). The treatment of children and adolescents within the justice system tended to abandon legal parameters, and was determined according to principles of treatment, reflecting the medicalisation of social problems.

Child Welfare 1930s to 1970s

A formal child care system was created in Latin American countries around 1930. The main motivation for doing so was the effect of the global economic crisis and the rapid process of immigration from the countryside to the cities. Both events increased the visibility of problems related to poverty: famine, illness and unemployment. In this context, street children emerged as a major concern. Huge sectors of society advocated the strengthening of social policies, principally in health, education and housing in this period (Pilotti 1999: 412).

The main change in child welfare at this time was the establishment of the first "Minor's Codes" where governments began to deal with abandoned children, young offenders and young people's problems. The administration of justice and protection for this group of the population was given to special courts called "Minors' Courts" or "Family Courts" depending on the country.

Another significant process which began in this period was the differentiation between children and young people judged to be "in danger" and those

considered as "dangerous" (Donzelot, 1979). The first group includes children neglected or coming from socially deprived families. The second group, who could share similar characteristics, was, nevertheless, seen as dangerous because they threatened public order.

In the case of children "in danger" the justice system usually punished them for their social conditions, in a process denominated criminalisation of poverty (García Méndez, 1994, Wacquant 2002), where the lack of competence to tackle the structural problems related to poverty results in a partial solution which consists of penalising the consequences of those problems, such as, unemployment and deficiencies in bringing education, housing and health coverage to the population.

García Méndez underlines the previous distinction between two groups of children and adolescents as follows: on one hand, we can find a group of socially-integrated children that attended school and benefited from the expansion of public education and subsequent compulsory schooling and later access to basic services provided by the state. On the other hand there were children coming from dysfunctional and economically deprived homes who were seen as being in a state of "moral risk". For these children the principal problem is their own family and, in consequence, the logical solution is to separate them from their environment and place them in the child care system. Young offenders could be considered as part of this last category, they were "dangerous" and were sentenced considering in first place their potential of being dangerous rather than looking at the actions which originated their contact with the justice system.

1950s and 60s

The decades of the 1950s and 1960s were characterised by the institutionalisation and sociologisation of problems. Sociologisation of crime implies that, just like in individual positivism, there is a pathology that could

be corrected, but in this case the abnormality is caused by social conditions because social structures would determine undesirable behaviour (Muncie, 2006). The practices in youth justice at this period became simultaneously repressive and welfarist, but there were no major changes in legislations. It was during this period that the conception of children as "objects of law" emerged.

1970s to the early 1990s

During this period, it was notable that there was a strengthening of Non-Governmental Organisations (NGOs), in particular during late 1970s and 1980s when many NGOs started to work in Latin America especially in relation to poverty and family welfare. Communitarian participation and a way of working that emphasised self-help in order to solve the problems were all new elements introduced by NGOs. The arrival of these institutions was related to the rise of authoritarian regimes characterised by ignoring living conditions and diminishing incipient welfare systems as they emphasised changes in economic policies (imposition of neo-liberal economic system). The novel economic policies resulted in increasing poverty rates and social exclusion. The nature of NGOs funding created an insecure atmosphere as they relied mainly on international sources which were not secured for every NGO's project, this situation originated solutions that could be labelled as temporary remedies (Pilotti 1999:415).

Pilotti emphasises the role that NGOs had in the period of discussion. One important contribution was the diffusion and the promotion of the signature of the United Nations Convention on the Rights of the Child (UNRCR).

According to García Mendez' classification, during the 1970s and 1980s efforts made in order to overcome the 'legal welfare' ideology. This period saw the agreement of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as Beijing Rules, 1985) which aims

to protect imprisoned children from abuse and establishes international standards. Also, by the end of the 1980s the International Convention on the Rights of the Child was declared. This treaty was signed by all the Latin-American countries between 1990 and 1991. Regarding Latin America local legislation, Brazil deserves a special mention as a pioneer in making children's rights part of the Constitution in 1988. Later, the promulgation of the Statute of Children and Adolescents in Brazil (enacted in 1990) is highlighted as a major effort promoting the protection of children and adolescents' rights.

Post UNCRC ratification

Cillero and Madariaga showed that there was a period where the Minors' acts coexisted with the UNCRC. This period started in 1990 with the ratification of the UNCRC and ends in different dates depending on each country reform process. Cillero and Madariaga emphasise that in this period contradiction between national legislations and UNCRC is undeniable and it became a big pressure to carry out legal reforms.

Child welfare in the 1990s

The successful process of the UNCRC's ratification by Latin-American countries was accompanied by processes of return to democracy. In the 1990s governments returned to play an active role in child welfare taking the place of NGOs that started to lose international aid and human resources as many people that worked for NGOs returned to work for the state, universities or were able to dedicate their time to political activities (Pilotti 1999: 416). The return of the state to a welfarist role was carried out in very different conditions. The authoritarian regimes had disbanded the Latin American welfarist attempts of the 1960s and early 1970s. Also the encouragement given to citizen participation by means of NGOs had been linked to decentralisation of local policies in order to work close to

community's real needs (Pilotti 1999:417). In that sense, there was a considerable amount of work for the governments to do in order to take charge of social problems in a democratic setting.

The ratification of the UNCRC motivated a wave of national legislative reforms in order to comply with the Convention. Pilotti (1999: 417) points out that in many Latin American countries some tensions occurred due to conflicts of interest among human rights activists that supported changes in legislation, judges that saw reforms as a threaten to their powers functions, child welfare agencies that had problems of meeting new demands, and NGOs which despite their role promoting UNCRC ratification once it was approved were left excluded from later discussions.

Consolidation of UNCRC

The current period is defined as the consolidation of UNCRC by Cillero and Madariaga. This consolidation involves changes not only in a legal level but also in executive and organisational fields. After the generalised UNCRC's ratification the authors identify three different states of affairs among Latin American countries (up to date until 1997):

- Countries in which, despite UNCRC ratification, previous Minors' acts remain in use. Currently, in Latin America (by the time of writing this thesis up), only Argentina has not modified its legislation in order to observe children rights before criminal justice.
- In other countries incomplete legislative reforms have been carried out, the UNCRC convention coexist with old approaches in youth justice and children rights.
- Countries that have changed their legislation significantly. In these countries institutional changes and new public policies have been implemented taking in account children's rights.

Emilio Garcia Mendez emphasises that in Latin America "a culture of protection (of "minors") has prevailed, with scientific mechanisms of classification and repressive segregation" (1990:4). This trend is not an isolated process in relation with what is happening in the rest of the world (discussed in Section 2.1). This situation presupposes the existence of an undifferentiated "object of protection", a minor, who is simultaneously in need and delinquent. From this blurring of distinction the confusion between legality and welfare is legitimised. It is in this sense that Garcia Mendez uses the expression "socio-penal control" in which an "object of law" (the minor) is exposed to undifferentiated use of instruments of social and criminal policy, punishing social aspects though imprisonment and other punitive sentences, regardless of constitutional guarantees that are granted to adults in the penal system.

Thus, the remaining task in the period surrounding the enactment and adhesion to the United Nations Convention on the Rights of the Child (UNCRC from now on) by Latin American countries focuses on transforming the place of children and adolescents in the justice system as actors who enjoy rights. This task is still a work in progress as formal rights have not been accompanied by an appropriate network of services. This problem is particularly serious in case of children and adolescents who come from economically deprived communities – which in the Latin American context are a considerable amount of the population.

Table 2 below shows the years in which each Latin American country modified its legislation related to youth justice.

Table 2 Youth Justice Reform in Latin America and the Caribbean

Country	Act	Year
Argentina	There is no parliamentary agreement until now. The last attempt was in 2008, but the act was derogated.	

Bolivia	Children and adolescent code	2000
Brazil	Childhood and adolescence statute	1990
Costa Rica	Juvenile penal justice act	1996
Chile	Adolescent penal responsibility act	2007
Colombia	Childhood and adolescence code	2006
Dominican Republic	Children and adolescents protection system and fundamental rights code.	2004 (replacing 1993 code)
Ecuador	Childhood and adolescence code	2003
El Salvador	Minor offender act	1995
Guatemala	Law for the Integral Protection of Children and Adolescents	2003
Honduras	Childhood and adolescence code	1996
Mexico	Constitutional reform that includes changes to youth justice system.	2005
Nicaragua	Childhood and adolescence code	1998
Panama	Special regime of adolescent penal responsibility	1999 (this act was hardened in 2003: offences were re-categorised and maximum of years in prison were increased)
Paraguay	Childhood and adolescence code	2001
Peru	Children and adolescents code	2000 (this code modified 1992 code)
Uruguay	Childhood and adolescence code	2004
Venezuela	Child and adolescent organic act	2000

Sources: Adapted from Cillero and Madariaga (1999) and Maxera (2005).

The following table shows the maximum time of imprisonment for young offenders in Latin America.

Table 3 Maximum time of imprisonment for adolescents In Latin America

Country	Max time of imprisonment	Comments
Bolivia	12-14 y.o.: 3 years 14-16 y.o: 5 years	
Brazil	3 years	
Chile	14-16 y.o.: 5 years 16-18 y.o.: 10 years	
Costa Rica	12-15 y.o.: 10 years 15-18 y.o: 15 years	
Ecuador	Over 14 y.o.: 4 years	
El Salvador	12-16 y.o.: 5 years 16-18 y.o: Up to 7 years (half of the adult's time for the same offence)	Under "Antimaras" Act (Act against gangs) the max period is 20 years, applicable to any person over 12 years old.
Guatemala	13-15 y.o: 2 years 15-18 y.o: 6 years	Children: 0-13 y.o. Adolescents: 13-18 y.o.
Honduras	8 years	
Nicaragua	6 years	
Panamá	7 years in case of murder, dealing drugs and rape	Maximum modified on 2003, before it was 5 years.
Paraguay	8 years	
Perú	3 years	Minimum 2 years and maximum 4 years when the offender is the leader of a gang.
Dominican Republic	13-15 y.o: 3 years 15-18 y.o: 5 years	
Uruguay	5 years	
Venezuela	12-14 y.o: 5 years 14-18 y.o: 2 years	

Based on Maxera and Carranza (2005)

Concluding remarks

In this section I have covered some of the developments in youth justice from an international perspective as well as a more detailed look at how it has changed in Latin America over time. As I have shown, there have been a number of changes over history, reflecting altering power structures and developments in the understanding of justice and the behaviour of children.

One of the interesting aspects to note is that there is an effort for states to work together on issues that relate to matters on their own sovereignty. Policy transfer is increasingly important as governments can examine actions taken in other countries to see if it is worth trying them in their own nations. It is quite common for a new policy measure to be justified by explaining that it has been successfully used in another country. Improvements in communications make it easy to find out about new policy developments across the world and to gain contacts to be able to find out more about these areas.

It is also significant that international agreements like the UNCRC look to bring more uniformity to how states organise their own affairs. There are incentives for countries like Chile to be part of this. It is very useful for the government to demonstrate their willingness to participate in these matters, in particular to show that there are universal rights that they will put above short term political measures. This sends out an important message to foreign businesses that they can invest with certainty in the country.

So as I have shown, there are factors that are helping states work closely on some matters and youth justice is one such area. However, the consolidation of the UNCRC into national legislation was uneven across the signatories, with some states introducing incomplete reforms and the likes of Argentina failing to modify its legislation at all. In Chile the reform was completed in 2007, which was 17 years after the UNCRC was signed.

It is important to note that there is not really any mechanism for ensuring that countries who sign up for international agreements actually implement the changes required. The UN will publish reports on implementation, taking an approach to 'name and shame' those who have failed to carry out what they have agreed to. In matters like youth justice they are unlikely to go any further than this, and so it will really depend on the nature of the government to how effective this is.

It can also be considered that the nature of a document like the UNCRC, intended for the vast majority of countries to sign, must bring difficulties to draft legislation derived from it. To ensure that it will be able to achieve its aims it will need to be written at a high level and not be too specific, otherwise it will not be able to be adapted by all of the legal systems and governments will not want to sign up to it.

In the following sections (see specially Chapter Five) I will show that there are some experts who feel the UNCRC has not been fully implemented in Chile. This is because such a reform is complex and is subject to a number of pressures. While the UNCRC was an important external pressure on the Chilean government, it was not as effective as some of the actors expected as internal political requirements of crime control came into the debate and debilitated the aims of improving the situation related to children's rights.

Chapter 3: Youth Justice Reform in Chile: Context, pre reform and main reform features.

3.1 Introduction

The creation of a youth justice system in Chile was not an isolated process. In the course of this transformation many events occurred. The status that children and adolescents have in the criminal justice system has changed, moving from a position of non-differentiation between children and adults towards the creation of a semi-specialised system¹⁴ in a context of progressive observance of international agreements.

This chapter describes the Chilean youth justice process from a historical perspective. First, the political context of the juvenile justice reform is described, illustrating the main features of Pinochet's military regime from 1973 to 1989 and the characteristics and changes made by democratic governments after the military dictatorship. Second, the main features of the reform to the adult criminal process are described. Following this, a chronological depiction of the changes in children's rights in Chile is shown. The key change is the ratification of the UN Convention on the Rights of the Child (UNCRC) in 1990. The period prior to the UNCRC ratification comprises the analysis of Minors' Acts of 1928 and 1967 when the "irregular situation doctrine" ruled juvenile justice. The period between UNCRC agreement and youth justice reform included a process of partial adaptations to UNCRC that are depicted at the end of this chapter.

¹⁴ As it will be discussed below, the youth justice reform did not create specialised courts. Judges, prosecutors and defence lawyers must have knowledge about youth justice but they usually do not work exclusively with young people.

3.2 The return to democracy and reforms to the justice system

The coup d'état by a military government body headed by Augusto Pinochet in 1973 deposed the socialist president Salvador Allende and thus ended a history of several decades of relatively strong republican life in Chile¹⁵. This period of dictatorship lasted from 1973 until 1989.

Among the most important and immediate actions taken by the *de facto* government were the following:

- The dissolution of Congress
- The executive took over entirely the legislative function
- Political parties were banned
- Electoral mechanisms were suspended
- Personal rights to liberty were abolished
- Persecution and repression of opponents to the regime were widely used, including imprisonment, torture and murder.

In 1988 a plebiscite was carried out in order to decide the continuation or cessation of the military regime. The result of the 1988 plebiscite was the rejection of the military regime¹⁶, which required, according to the Constitution of 1980¹⁷, the announcement of general elections for President and members of the Parliament in 1989. These events marked the end of the

¹⁵ This assertion depends on one's historical point of view. Some historians (See Grez and Salazar, 1999; Salazar et al 2007) point out that Chilean history has not been stable and based in citizens sovereignty but in oligarchy management by a small group of people that holds economic, political and cultural power.

¹⁶ The execution of a plebiscite was established in the Political Constitution of 1980, in this plebiscite the options were "Yes" and "No" to the continuation of the military government. The result was 44% for "Yes" and 56% "No".

¹⁷ The Political Constitution of 1980 was written by jurists linked to the military regime during the 70s and was voted in a plebiscite. Also was seen as a step to a democratic transition by establishing the date for the plebiscite (1988) in order to decide the military regime continuity. The legitimacy of the Constitution has been constantly questioned due to the conditions in which the vote took place (under a repressive regime that did not allow dissent from what it was proposed by the regime). In short, the text was "closed, finished and guarded with guns" (Salazar et al. 2007). The Constitution worked as a way of institutionalising and legalising elements for the success of the neoliberal economic system.

dictatorship period and the beginning of the transition to the democratic period.

The Governmental programme undertaken by Pinochet had two main elements. First, there was a marked change in the relationships between the state, the economy and society. Chile changed from a state which sought social integration and fairer redistribution of resources to a “minimal State” in which risks are borne individually, with limited access to welfare programmes. The main efforts of the government were focused on maintaining the macro-economic balance and on deregulating financial markets, in order to liberalise the national economy. The social consequences of these changes included an increased unemployment rate and a reduction in the help offered by the state to those in poverty. The economic changes were complemented by a series of changes in social policy. The main transformations were:

- Reduction of resources for housing, public health and education;
- Decentralisation and transference of public function to private sector;
- Introduction of demand subsidies;
- Focalisation of social programmes (in extreme poverty sectors) and,
- Weakening of trade unions in order to control social demands.

Before 1973, social integration depended progressively on political participation through political parties. As political parties were dissolved during the military regime, people were left without a space in which they could set out their requirements and achieve their goals related to improvements in their socio-economic situation. The state's sudden withdrawal from the economic and welfare fields had the intention of generating social and institutional shifts such as an increase of individualist values. Robert Castel (1997) has given the label “negative individualism” to the process by which individual lacks the essential conditions to be a complete subject. This kind of individualism is not based on the individual's distinctive characteristics that make people “different but comparable”. Negative individualism refers to people with few or no bonds with society due

to social, economic or cultural reasons. In Castel's thesis, work is the main element of integration. As well as a financial income, work provides social integration and is linked to social security. In a context where the state is diminishing progressively its functions, economic transformations lead to increasing unemployment and social expression is repressed, negative individualism is a consequence likely to happen. In Chile under the military regime, a considerable part of the population remained socially vulnerable and had few means to overcome the consequences of the free-market (see Garretón, 2007).

The changes introduced during the military regime impacted on the everyday life of the population and were very unpopular due to levels of poverty that resulted. The economist Patricio Meller summarises the measures taken and their consequences. Among the regressive economic measures there were "subsidies to holders of dollar-denominated debt provided by the central bank" which along with other policies that sought to reduce public spending "raised the unemployment rate over 26%, reduced real wages by 20% for almost five years, and reduced health, housing and education budgets by 20% per capita. Finally, the required real devaluation raised the cost of living for the poor" (Meller, 1991: 1545). In view of this, the process could only be achieved in a context of strict social control. This process was characterised by the imposition of authoritarian-neoliberal rules which remained a feature of Chilean society until the return to democracy. As the sociologist Manuel Garretón (1989) predicted, the democratic transition involved a series of "authoritarian enclaves" that in his opinion gave a "precarious and partial" status to democracy. Garretón describes three types of enclaves: an institutional enclave; a second enclave related to influential actors from the military regime that continued participating in public life, and a symbolic one consisting of the violations of human rights. An example of this is the fact that Pinochet had a seat in the senate (from 1998 to 2002), after leaving his position as Chief of the Army in 1998. The most noticeable enclave, which is still important today, is the institutional authoritarian one, given by the Political Constitution of 1980. The institutions that are established in the Constitution guarantee strong presidential and military powers, and include a

diminished position of parliament, abolition of local authorities' elections, and the existence of unelected senators¹⁸ (Garretón, 1989: 51-52). Since the return to democracy there have been timid attempts to change the Constitution, but only mild reforms have been achieved as any changes require a majority in the parliament, and these are almost impossible to reach due in part to the electoral law enacted just months before Pinochet left power.

The electoral system is based on a binomial formula in which each electoral districts elects two representatives in a non-proportional way, the “winning party could take both seats only if it had twice the votes of the losing party”¹⁹ (Colliers and Sater, 2004: 381). This mechanism results in the two biggest coalitions being kept in power with the smaller parties being excluded. Another effect is for the results to be weighed towards the parties of the right as it favours small rural areas that traditionally have been inclined to vote for right wing parties (Pastor, 2004; Colliers and Sater, 2004).

Another highly controversial precondition made by the military regime was the “Amnesty Law” which prohibited the prosecution of people accused of human rights violation under the military regime. Also the Constitution established that former presidents could have a seat for life in the Senate, a situation that was derogated only in 2005.

The political transition started with the first democratic government which took office in March 1990. From then until 2010, Chile was governed by four successive centre-left governments from the same political coalition, called Concertación de Partidos por la Democracia²⁰ (see Table 4 Political parties in Chile). In the most recent presidential election, in January 2010, the

¹⁸ The posts of unelected senator and senator-for-life were established in 1980's Political Constitution and existed until 2005 when a partial reform to the Constitution was carried out. When the parliament was reopened in 1990 there were 38 elected and 9 unelected senators.

¹⁹ See Law 18,700 (Constitutional Organic Law on Popular Elections and Vote Counting), article 109 bis (enacted in May 1989).

²⁰ The coalition is composed by the Christian Democratic Party, the Socialist Party, and the Party for Democracy and the Social Democratic Radical Party. The Communist Party has not joined this coalition and was out of the Parliament until 2010 when got three representatives. The Humanist Party has not achieved any seat since return to democracy.

candidate of the right wing coalition (Coalición por el Cambio²¹), Sebastián Piñera, gained power.

Table 4 Political parties in Chile (data 2011)

Party ²²	Tendency	Foundation	Legal recognition	Deputies	Senators
Renovación Nacional	Right	1987	February 8th 1988	17	8
Partido Demócrata Cristiano	Centre	1957	May 2 nd , 1988	19	9
Partido por la Democracia	Centre	1987	May 9th, 1988	18	4
Unión Demócrata Independiente	Right	1983	May 3rd, 1988	39	8
Partido Socialista de Chile	Centre-Left	1933	December 19th, 1990	11	5
Partido Radical Social Demócrata	Centre	1994	August 18th. 1994	5	1
Partido Comunista de Chile	Left	1933	May 28th, 2010	3	0

Source: Based on Political Database of the Americas, Georgetown University

<http://pdba.georgetown.edu>

²¹ Coalición por el Cambio (Coalition for change) replaced an older coalition called Alianza por Chile in May 2009. This coalition contains two of the biggest right wing parties (Renovación Nacional and Unión Demócrata Independiente) plus a series of regionalist movements and independent sectors (see UNIÓN DEMÓCRATA INDEPENDIENTE. Available: www.udi.cl 2010].)

²² Other parties with representation in Congress are:

Partido Regionalista de los Independientes: 2 seat in the Chamber of Deputies;

Movimiento Amplio Social: 1 seat in the Senate

Independent candidates obtained 6 seats in the House of Representatives and 2 seats in the Senate in the last legislative elections in December 13, 2009. See Political Database of the Americas, Georgetown University.

The first democratic government headed by Patricio Aylwin (Christian Democratic Party) between 1990 and 1994 had as its principal focus to deal with the “transition to democracy” in a context where the military still retained a lot of power. It was also fundamental in this period to maintain the balance of the economic system whilst providing solutions to social problems that the economic model produced. In the field of justice there was a special concern with human rights violations that occurred under the military regime. Under this government the National Committee for Truth and Reconciliation was established (in April 1990) with the aim of throwing light on the most serious cases of human rights violations occurred between September 1973 and March 1990. The Committee produced a report (known as the Rettig report²³) which found more than two thousand cases of serious human rights violations. Under this government the UN Convention on the Rights of the Child was ratified²⁴ and a review of the legislation related to children and adolescents was commissioned although that review did not lead to concrete changes during Aylwin’s government.

The second democratic government was led by Eduardo Frei (Christian Democratic Party) between 1994 and 2000. This period was characterized by good economic performance and progress on public works at least until the Asian financial crisis of 1997²⁵. The reform to the justice system was among the issues that were considered in the government’s agenda. Until 2005, Chile had an inquisitorial system that presented several problems of access to justice and was widely regarded as partial due to the extensive discretionary powers of the judges (Correa and Jiménez, 1995). Under this government, the necessary conditions for the implementation of large-scale

²³ The report can be downloaded from http://www.ddhh.gov.cl/ddhh_rettig.html

²⁴ The UNCRC was signed by Chile just a couple of months-26th of January 1990- before the first democratic government since 1973 would come into power. For a revision of the dates of signing and ratification of the UN Convention in Latin America visit the webpage of the Instituto Interamericano del Niño, la Niña y Adolescentes (INN, part of the Organisation of American States). List available from:

http://www.iin.oea.org/explotacion_Sexual/versi%C3%B3n%20final/Anexo%20II.htm

²⁵ French-Davis and Muñoz (2003) distinguish two sub-periods in Frei’s government. The first four years (1994-1997) were characterized by strong growth with an increase of 7.8% of GDP and low unemployment (6.9% of active population). The last two years of this government (1998-1999) were affected by the Asian financial crisis, the GDP grew only 1.1% with respect to the previous four years and unemployment increased to 8.6%.

reform were created. The Bill of the Criminal Procedure Code was written and also new institutions, such as supervisory judges and the Office of the Public Prosecutor, were created. At the end of this Governmental period, reform of the criminal procedure was firmly placed on the political agenda as a key objective related to the democratic consolidation and modernisation of the state (Blanco, 2003).

The next presidential period was led by Ricardo Lagos (Socialist Party, 2000-2006). During Lagos's administration Chile achieved important progress in infrastructure and international integration by means of important economic agreements. It was in this period that reforms to the criminal procedure were implemented. In the next section the characteristics of the reform will be detailed. As it will be seen in chapter 5, it was also under this government that the first draft of the Act on Adolescents Penal Responsibility was put forward for Parliamentary debate.

Table 5 Country organisation and demographic characteristics

Chile is a unitary democratic state with a presidential regime formed of several self-governing institutions that work under a constitutional framework, which defines their functions (1980 Constitution).

The State is split into three branches:

- The Executive Branch, ruled by the President of the Republic;
- The Legislative Branch, formed by the Chambers of Deputies and Senators; and
- The Judicial Branch, headed by the Supreme Court.

The Justice System is ruled according to the European continental system of law (Roman law).

- Chile has a population of 17,094,270 inhabitants (2008)
- Around third of the population is aged between 0 and 18 (2008).
- 7% of the population is aged between 14 and 18 years old (2008).
- 87% of the population lives in cities (2008)
- The amount of people belonging to an ethnic minority group is 5%. The biggest group is Mapuche with 604.000 (87% of ethnic population). (2008)
- The average income per capita is 13,880 USD (2007).
- Chile is placed 46 in the Human Development Index 2009 (the index considers: longevity measured by life expectancy at birth; knowledge measured by a combination of the adult literacy rate and the combined primary, secondary, and tertiary gross enrolment ratio; and standard of living by GDP per capita). Despite its place in the HDI rank, Chile has a Gini index of 52, being the 19th least egalitarian country (Gini index lies between 0 and 100, a value of 0 represents absolute equality and 100 absolute inequality). Denmark has the lowest Gini (24.7), Germany Gini index reaches 28.3 and in the United Kingdom is 36. Namibia has the highest Gini index among UN countries, 74.3.
- The poverty rate was 14% in 2006 (when the last household survey –CASEN- was carried out). The average poverty rate in Latin America is 33%.
- The richest quintile of population has an average house income 13.1 times higher than the poorest quintile (2006).
- According to the measures of child poverty carried out by the UN Economic Commission for Latin America and the Caribbean (ECLAC), in Chile 6.1% of children live in extreme poverty while 23.2% are living in poverty.

Sources: Poverty Relief Foundation 2006, National Institute of Statistics of Chile 2007 and 2008, UNICEF 2008, UNDP 2009, ECLAC 2009 and 2010.

Table 6 Chilean electoral system details

National Executive	
Composition	1 President and 1 Vice-President
Election System	Absolute majority
Duration of Term	Four years
Term Limits	Presidents are allowed to serve unlimited non-consecutive terms

Upper House of the National Legislature – Senate	
Composition	38 Senators
Election System	Each of the 19 senatorial constituencies elects two senators
	Parties, coalitions, and independents present lists with two members. Voters choose their preferred candidate, and the votes for both candidates on a given list are summed together.
	To win both seats, a list must receive twice the number of votes as the second-most voted list
	If this does not occur, the first and second highest voted lists each win one seat
	The candidate with the most votes on each qualifying list receives this seat.
Duration of Term	Eight years. Half of the senate is replaced every four years.
Term Limits	Senators may seek re-election indefinitely
Lower House of the National Legislature - Chamber of Deputies	
Composition	120 Deputies
Election System	Each of the 60 electoral districts elects two deputies
	As in the case of the Senate, parties, coalitions, and independents present lists with two members
	To win both seats, a list must receive twice the number of votes received by the second-most voted list
	If this does not occur, the first and second highest voted lists each win one seat
Duration of Term	Five years
Term Limits	Deputies may seek re-election indefinitely
State / Provincial Executive	
Composition	One intendente (governor) for each of Chile's 14 regions and 1 for the metropolitan region

Election System	Intendentes are appointed by the President
Duration of Term	Four years (although intendentes may be dismissed by the president at any time)
Term Limits	No

Source: Political Database of the Americas, Georgetown University

<http://pdba.georgetown.edu>

Changes in the discourse about security and its relation with the Judicial System

At this point I shall draw on the analysis developed by Lucía Dammert (2003)²⁶. Dammert suggests the existence of clearly demarcated periods in the way that security and crime has been understood by the governments since the beginning of the military regime until 2003.

The evolution of policies related to security and crime in Chile can be separated in two main periods. One stage, under the dictatorship of Pinochet, policies concentrated on struggling against an “internal enemy” personified by opponents to the military government. The second stage occurred under the return to democracy and focused on the protection of the public from crime.

During the military regime, the main preoccupation was about the so-called “internal enemies” or opponents to the regime who were accused of planning terrorist attacks against the military government. The most important matter in this period was the extensive political violence which was carried out under a programme called the “National Security Doctrine”. Under this policy the official position was to contain any attempt to use force by opponent groups inside the territory; under this logic, the official discourse defined the nation as the subject of protection²⁷. This aim was accomplished using

²⁶ Dammert, Lucía (2003). El gobierno de la seguridad en Chile 1973-2003. http://www.urbalvalparaiso.cl/p4_urbalred14/site/artic/20031119/asocfile/DAMMERT_Chile.pdf (Acceded in 2006, link checked in November 2008).

²⁷ Some political groups of the extreme left planned armed attacks against military forces. An example and corroboration of regime accusations was the attempt on Pinochet's life carried out in

disproportionate military force. Violence was used as an institutional method of maintaining public order and controlling, or even eradicating, groups and people that could challenge the order established by the military. Under the “National Security Doctrine” units specialised in repression and torture were created (the National Directorate of Intelligence -DINA- at the beginning of the regime and later the National Centre of Intelligence CNI). Also the police was militarised, and its administration was passed to the Ministry of Defence²⁸.

In the case of control of ordinary crime, the government resettled deprived families in ghettos at the periphery of cities, isolating people who presented a risk of violence or other forms of crime. The strategy for controlling criminality comprised, fundamentally, of the isolation and exclusion of poor people. Towards the end of the military regime a series of public reports of police violations of Human Rights increased mistrust of the police.

At the beginning of the democratic period the new government had to face some serious problems related to public security, crime and public order. In this period, the police retained their militarised style and cultural proximity to the army, which gave them a lot of power and autonomy²⁹. The issues that captured public interest in the early 1990s were linked to the disregard by the former government of regime opponents’ human rights and the terrorist actions by ultra-left organisations. One of the measures taken by the new

1986 by the Frente Patriótico Manuel Rodríguez. One year later, the military regime took revenge through the “Operación Albania”, a raid against the Frente Patriótico Manuel Rodríguez’s leaders, where twelve people were killed.

²⁸ In the Political Constitution of 1980 it was established that the functions of the police (national and secret police) form the public force and must give support in the efficacy of the law and guarantee the public order and the security inside the country.

²⁹ The police was under the authority of the Ministry of Defence (same ministry that oversees the army) until the beginning of 2011 when passed to the Ministry of the Interior (Chilean Home Office). The Ministry of Interior -at the same time that the police inclusion to it- the Ministry of the Interior and Public Security. Police forces until that moment were historically closely linked to the military, as it was highlighted by the former Minister of Defence in his farewell speech to the police given in July 2011: “As Minister of Defence I would like to highlight an essential characteristic of Carabineers of Chile, a feature that has remained unchanged since its establishment, this is stated in its organic law and therefore it will remain untouched: its military character, attribute that is shared with some of the most prestigious police forces around the world” (Andrés Allamand speech, July 2011 available from: <http://www.defensa.cl/2011/07/19/palabras-del-ministro-de-defensa-andres-allamand-en-el-traspaso-de-carabineros-de-chile-y-pdi-al-min/>).

administration was to pardon political prisoners. A more secure country was considered to be a fundamental part of the process of returning to democracy. Because of a temporary increase of terrorist acts, a Public Security Council was created, which was promptly replaced by the Directorate of Public Security and Information (Dispi), under the responsibility of the Chilean Home Office.

During the next democratic government (President Eduardo Frei, 1994-2000) the central preoccupation was the protection of the public against crime. The general public perception was of rising crime, exacerbated by the mass media (Ramos and Guzmán, 2000); and the evidence provided by some think-tanks, by means of opinion surveys, was that delinquency was one of the most important social problems for the population³⁰. However, official information did not allow an in-depth analysis. Information systems are still unreliable which “not only increases social concern [about crime] but also diminishes policy effectiveness” (Dammert et al., 2008:9).

At the same time, right wing political parties began to call for tightening up on the punishment of minor offences, the reinforcement of the police role and lowering of the age for criminal responsibility. There was an attempt in 1994 to establish a national plan of security, but this failed due to tension between the political world and the military. The government promoted some new short-term measures which aimed to achieve greater involvement of the community in solutions to problems related to delinquency.

Dammert (2003) suggested the end of the 1990s as the period in which the preoccupation about crime went beyond debate and discussion, and resulted in concrete measures. At the beginning these measures were very specific and were principally based on the improvement of police efficiency.

³⁰ The oldest opinion surveys that introduced delinquency amid the most worrying problems were made by the Centro de Estudios Públicos, a research centre created in the eighties. Also think tanks as Fundación Paz Ciudadana and Libertad y Desarrollo, both created in the early nineties, have produced survey series about delinquency perception and fear of crime. Fundación Paz Ciudadana has had a considerable influence in the elaboration of public policies about crime and security since its creation. Also its studies achieve considerable media coverage due to the presence of the owner of the biggest Chilean press media among Paz Ciudadana's trustees.

However, focusing the attention only on the police was not enough to diminish the perception about delinquency and the necessity of a comprehensive judicial reform which gives a clear signal of consistent changes was evident.

3.3 Criminal Procedure Reform

There were numerous reasons for the reform of the criminal procedure and these went beyond the preoccupation with the supposed increase in crime rates³¹.

Once the transition to democracy was accomplished, state modernisation was considered indispensable to the consolidation of democracy. Also judicial reforms were viewed as a mandatory requirement to achieve international integration and to give foreign investors clear signals of reliability (Faúndez, 2005). A series of justice reforms were planned during the mid-1990s (family law, prisons system, creation of the Judicial Academy for judges training, etc.). Among these, the criminal procedure was the main area of judicial reform. This reform reconciled criminal prosecution and due process, making possible impartial trials where investigation of the crime is carried out by an independent body, leaving to the judge the role of deciding if the defendant is guilty or not and abandoning the inquisitorial system for an adversarial one.

Several authors have pointed out the importance of the rule of law for democratic consolidation in developing countries (see Prillaman 2000, Couso, 2004; O'Donnell, 2004; Faúndez, 2005). Although the rule of law does not have an agreed meaning, O'Donnell (2004) attempts the following definition: "whatever law exists is written down and publicly promulgated by an appropriate authority before the events meant to be regulated by it, and is fairly applied by relevant state institutions including the judiciary" (p. 33). As it

³¹ The first victimization survey at national level was carried out in 2003 and has been taken annually since 2005. According to this survey in 2003, 43% of households had at least one member victim of crime; this proportion has decreased to 31% of the households having a victim of crime in 2011.

was stated in O'Donnell's definition, the rule of law involves having certainty about the norms that regulate situations and behaviours before they take place. This characteristic allows necessary confidence among different social sectors, which is a fundamental element for societies emerging from authoritarian government, as it was for Chile in the 1990s. Following the argument set out by Faúndez (2005), although the role of law and legal institutions has been very important in the establishment and consolidation of democratic regimes in developing countries, it is not true that all the problems can be solved by implementing justice reforms. In that respect, the role of international organisations and bilateral donors' agencies that consider the rule of law essential for democratic consolidation usually did not deem that justice systems interact with political and economic constraints³². Chile was no an exception among developing countries and has received professional support and monetary contributions of international organisations. For instance, the reform of the Criminal Procedure was carried out with aid of the German Agency for Technical Cooperation (known as GTZ for its acronym in German *Deutsche Gesellschaft für Internationale Zusammenarbeit*) and a number of studies on justice systems have been developed by Justice Studies Centre of the Americas, an organisation that depends of the Organisation of American States.

O'Donnell (2004) points out that for a truly democratic rule of law, there needs to be the guarantee of political rights and civil liberties and mechanisms of accountability for controlling the power of the state. An independent judiciary and organisations able to impose effective accountability on state actors are essential for the democratic aspects of rights according to O'Donnell. In Chile the judiciary has a reputation for independence, in which the levels of corruption are low. According to Couso

³² Although at some point several countries that received help were unenthusiastic about the necessity of the rule of law, international organisations such as the International Monetary Fund and the World Bank started to include this requirement amid the conditions for loans and offered attractive aid that finally convinced them. According to Faúndez (2005), currently almost every developing country is involved in some project oriented to reinforce or reform their legal systems. On the other hand, Faúndez points out that nowadays international agencies and bilateral donors consider that legal systems improve as a "magic wand" which will solve the most of economic and social problems. He indicates that the key question that the organisms tend to omit is "how law and legal institutions can be made to contribute to social and economic development" (Faúndez, 2005: 568).

(2004), the judiciary has kept its independence by historically maintaining a relative distance from executive and political powers.

In the history of the Chilean justice system, several crises have occurred and profound criticisms have been made. In the 1960s, the justice system was characterised by slow and inflexible proceedings that did not respond to social requirements, with especially detrimental effects on deprived citizens. As a signal of the situation, the first judiciary strike demanding more economic resources was carried out during that decade. In the 1970s, the judiciary were accused of “meeting dominant class interests” due to decisions favourable to landowners in cases of property expropriations made by the government under the agricultural reform. During the military regime, critics of the justice system were associated with the economic crisis of 1982 in which big commercial groups faced trials related to bankruptcy and other financial mismanagements. Also, the justice system was criticised for failing to protect human rights. Despite all this, the first attempts to modernise during the period of the military regime were resisted by the judiciary (Correa and Jiménez, 1995).

Therefore, there were several pressures to improve the justice system, including democratic consolidation and economic and administrative issues. The new democratic government took on the task of state modernisation in order to make institutions more able to deal with social, political and economic challenges. The democratic transition demanded a judicial system which protects the rights of all the population on an equal basis and the necessity of economic development promotion.

Among the dimensions of the legal system, criminal justice was in a particularly critical state. Many constitutional rights were not observed, and the diagnosis made by several experts indicated the urgent need to modify criminal procedure and improve prison conditions (see Correa and Jiménez, 1995). The aims were related to having a criminal justice system that was egalitarian, efficient and respecting of procedural guarantees for both victims and accused.

The main elements of the Chilean Criminal Procedure Reform, accomplished between 2000 and 2005, addressed the weaknesses in the old justice system. The reform aimed to secure quick, efficient and transparent trials and extensions to guarantees for victims and defendants. The system changed from inquisitorial to adversarial, and the functions previously discharged by a single judge – to accuse, to investigate and to adjudicate and carry out sentencing – were divided between three different institutions independent from each other. A system of public defence for defendants was also provided by the state (see table 7).

Table 7 Old and new criminal procedures

The reform to the criminal process changed the old inquisitorial criminal procedure which had been in operation since the 19th century. The main characteristics of this procedure were:

- Widespread use of written documents and judicial secrecy during the investigation.
- Investigation, laying of charges and sentencing in the hands of a single person: the Crime Judge.

New Criminal Procedure Code establishes an adversarial system. New institutions of the justice system are:

- Public Prosecutor's Office: in charge of investigating crimes independently and laying charges against the defendant
- Public Defender's Office: responsible of the legal representation of defendants (especially in cases in which people do not have access to private defence.
- Supervisory Judge (juez de garantía): ensures that due process is followed. Also resolves any dispute between the parties involved in the process.
- Oral Trial Court: If the matter is not resolved through procedural reduction mechanisms, an oral trial is held. In this trial prosecutor and defender present their arguments, evidence, pleas and claims to a collegiate tribunal of three judges.

3.4 A historical perspective on children's rights and juvenile justice in Chile

The state of affairs with respect to Chilean children's rights was in general similar to the rest of Latin America during the 20th century (see chapter 2). The interest in children's rights has its origin in ideas that originated in Europe and United States. According to Rojas (2007) several texts written in Europe and United States were influential in raising concerns about the physical vulnerability of children and the abuses that they suffered from adults and at the hands of the state. Also important were a series of international meetings about the situation of the children in Latin America and Spain carried out at the beginning of twentieth century.

The treatment of children in legal and welfare systems evolved

from the lack of historical differentiation of childhood as a separate category (with psychological, social and cultural specific characteristics) towards a progressive recognition of this group and its characteristics. Once childhood was regarded as a stage of life with a special status, the discussion about what rights were appropriate for children became controversial. Positions ranged from those that were sympathetic to concerns about physical protection, to those that stressed the necessity for substantial autonomy for children (Rojas, 2007; Cillero and Madariaga, 1999; Garcia Mendez, 2002). The first institutions which showed concern about children's life conditions in Chile were organisations linked to Catholic religious groups and some other secular and private ones such as the Child Protection Society and the Childhood National Board.

One way of analysing the treatment of young people in the criminal system is to explore changes in the legislation related to this field. Below, the Chilean legislative evolution is chronologically described using the ratification of the UNCRC as a key milestone.

Children in the justice system before the ratification of the United Nations Convention on the rights of the child.

Young offenders until the enactment of the Minors' Act of 1928

Until the enactment of the first law specifically concerned with children in 1928 (Act 4,447 of 1928), the treatment of young offenders over the age of 10 was undifferentiated from that of adults; and both groups were held in the same kind of prisons. Before the first Minors' Act of 1928 the State had no significant responsibilities for children at risk or children in need, leaving this role to private charity initiatives. The only matter in which the State had a defined role was in the punishment of young offenders in the

interest of the maintenance of social order. Strictly, however, the treatment of all age groups of young people was not identical to that of adults. Children under 10 years of age were not held criminally responsible and young people between 10 and 16 years old were subjected to a "discernment evaluation" (in essence, to test their *mens rea*). Also, young offenders received less severe sentences than adults.

The majority of children with a sentence from the Criminal or Civil Courts were sent to adult prisons, where the sanitary conditions and safety and security for children were inappropriate. Despite the popularity of foreign ideas about the necessity of child protection and recurrent public concern about the bad living conditions and abuses that young offenders suffered in adults' prisons, the lack of places dedicated specially to young offenders was a characteristic of youth justice system in Chile until the 1990's (Rojas, 2007).

The Minors' Act of 1928 established the age of criminal responsibility at 16 years old and introduced the discernment process for offenders between 16 and 20 years old. Also, it prohibited the practice of keeping children together with adults in the same prisons – though this prohibition was largely ignored³³.

In the presidential presentation of the Minors' Act of 1928 in the Parliament, the government argued that social problems and family status were the main reasons for enacting this law. It was pointed out that society could not remain indifferent in the face of clear existence of serious child neglect. The presentation argued that juvenile delinquency was a consequence of family problems caused by the *"irresponsibility or immorality of parents"*, and that for the *"preservation of society"* it was urgent that an effective

³³ The effective separation of young offenders and adults only was carried out in 1994. At that time, about 2000 young offenders were held in the same facilities as adults.

solution was found (see Cortés 1994).

Another interesting issue is the predominance of a medical-pedagogic discourse in which biological determinism was central, counteracting the importance given to social conditions. This discourse favoured medical treatment as more effective than simple punishment³⁴. Juvenile delinquency was considered as an individual pathology (reflecting Lombroso's influence) and consequently it was argued that the treatment of offenders ought to be individualised. The main aim at this stage was to preserve moral order in the society. In this context there were two practical approaches to the resolution of the problem of deviant children: the asylum and the reformatory. The asylum was dedicated to the protection of neglected children and the reformatory dealt with behavioural problems. This distinction was not always clear and in the course of a child's life it was usual that he or she had been in both types of institutions.

Consequently, Rojas (2007) points out that between 1900 and 1930 the discussion in Chile about how neglected children and/or young offenders had to be treated did not follow a defined principle. The ideas in circulation had defenders and detractors, and as result a range of different policies were discussed and implemented.

The "abnormal circumstances" (situación irregular) paradigm and Minors' Act of 1967

After 1930's, the "abnormal circumstances" paradigm became clearly acknowledged in Chile. The previous importance given to

³⁴ In this period doctors become key players. In instances like Children Panamerican Meetings physical and mental health were underlined. In this context emerged the concept of pathological individuals for whom individual and normative treatments were created (METTIFOGO, D. & SEPÚLVEDA, R. 2004. *La situación y el tratamiento de jóvenes infractores de ley en Chile*, Santiago, Centro de Estudios en Seguridad Ciudadana Universidad de Chile.)

biological conditions (and medical-pedagogical solutions) was replaced by concern about the social ambience in which children grew up and in the way which this environment influenced delinquency or deviant behaviour (Garcia Mendez, 1990).

The concept of children in abnormal circumstances was formulated for the first time in an official document in 1942 in the case of Chile (Tsukame, 2008). This concept appeared in the mission definition of the General Directorate for the Protection of Children and Family (Dirección General de Protección de la Infancia y la Familia, PROTINFA). In the 5th section it is pointed out that: "*a minor is in abnormal circumstances*" if he or she:

- is neglected physically or morally, or
- is in danger of being neglected, or
- has committed a criminal offence.

In 1942, the General Directorate for the Protection of Children merged with another institution, called the General Office for the Protection of Children and Adolescents, falling under the direction of the Ministry of Health. Finally in 1952, the new institution and the rest of care services for children in an irregular situation become part of the National Health Service (Tsukame 2008; Metifogo and Sepulveda 2004).

With the concept of "abnormal circumstances" a clear separation between socially integrated children and deprived children was established. The first group corresponded to children growing up in a conventional family, attending school and with their basic needs satisfied. Children in "abnormal circumstances" corresponded to those minors whose were out of school, did not have access to health services and lived with dysfunctional families.

The "abnormal circumstances" paradigm was reaffirmed in a new

Minors' Act enacted in 1967 (Act Number 16.618). The Minors' National Council (CONAME) stated that children were in an "irregular situation" when they:

- had behavioural problems related to their social background, or
- suffered some physical or intellectual disability, or
- were economically deprived, or
- were in conflict with the law.

The Minors' Act of 1967 did not make a clear distinction between young people who were victims of mistreatment and young offenders. The judges' resolutions were considered *protection measures* for children and, consequently, the necessity of legal defence was not evidently indispensable. For a long time legal aid did not exist, even in case of resolutions which could be classified as in breach of fundamental rights.

The procedure for deciding whether *protection measures* should be adopted was inquisitorial; indeed, it did not even take the form of a trial. For adolescents aged between 16 and 18 who were accused of penal law offences the procedure was secondary to the process of establishing the young person's discernment ability – a decision that was taken by Minors' Judges. The most remarkable problem in the system that remained until June 2007 was precisely the absence of due process, leaving young people in an unfavourable position in the justice system³⁵, where adults were subject to a fairer judicial process.

Under the old system, no investigation of the offence was carried out; it was not even established whether the young person

³⁵ This was even more evident once the Reform to the Criminal Procedure was carried out (gradually implemented between 2000 and 2005). This reform left youth justice system out of the reform precisely because it was not considered part of the penal system.

committed the offence. In some cases this could result in punishment or "protection measures" for young people who had not participated in any offence. In general the statements given by the police or witnesses constituted the entire evidence for the case. The wide discretionary power that judges possessed allowed the use of imprisonment or protection measures on the sole grounds that the adolescent was under some "moral" or physical risk – i.e. in an *irregular situation*.

This discernment process introduced a great amount of arbitrariness in the system and had two consequences. First, young people who were judged to lack discernment between good and evil were sentenced in the Minors' Court where the judge could adopt any protection measure specified in Article 29 of the Minors' Act; most of these measures involved some form of detention. Secondly, adolescents who were judged to possess discernment passed to a Criminal Court and faced the same process as adults, although with diminished sanctions.

Creation of the National Minors' Service

The National Minors' Service – SENAME – was created in 1979 as an institution within the Ministry of Justice. This institution dealt with all the work necessary in order to observe the Minors' Act of 1967. SENAME has among its functions the protection and assistance of children who do not have parents (or someone *in loco parentis*). SENAME also has to give support to children who are victims of violence, mistreatment or have been abandoned. SENAME does not manage all the care centres in the country but is the institution in charge of coordination and giving directing lines to collaborating institutions. Currently this institution is responsible for developing programmes that reinforce young offenders' sense of responsibility and their social reintegration.

The National Minors' Service continued using the "abnormal circumstances" of children as a concept that defined its users. A child in "abnormal circumstances" was defined as follows: *"Minors who need custody or cases in which adults in charge are not capable of looking after their children in a way that guarantees their integral and normal development. Also those minors with behavioural problems and who are in conflict with the law"* (Tsukame, 2008: 12).

Legislative changes after the United Nation Convention on the Rights of the Child ratification

This section describes the principal characteristics of the UNCRC and the legislative changes that occurred in Chilean legislation concerning juvenile criminal justice after the government signed the UNCRC in 1990. The period can be divided in two main stages. The first period goes from 1990 (when Chile subscribed the Convention) to 2002, the year in which the executive presented the Youth Justice Reform Bill. The second stage

describes the period from 2002 to 2007; being 2007 the year in which the new act was implemented.

From UNCRC ratification to the first youth justice draft bill

As discussed in chapter 2, one of the effects of the UNCRC has been the promotion of a profound reform movement in Latin American legislation relating to young people starting in the 1990s (Cillero and Madariaga, 1999). From 1990 onward, Latin American countries have followed one of these three paths:

- Keeping Minors' Acts
- Carrying out partial reforms
- Total adaptation of systems to meet the UNCRC

Chile subscribed the UNCRC in 1990. In the Chilean case the path followed has been to carry out partial reforms in several areas related to childhood wellbeing. In the youth justice field, coupled with Chile's accession to the Convention, several characteristics of the previous Chilean youth justice system created pressures for reform as a priority within family and youth justice. The key factors behind legal changes were:

- lack of differentiation between child victims, young offenders or socially excluded youths (as discussed above);
- lack of effective outcomes (measures did not result in desistance from crime);
- evidence of excessive use of imprisonment; and
- the very poor conditions in which children and adolescents were held in detention centres.

Serious contradictions between legal standards established in the political constitution and international agreements and the real situation of children and adolescents were recognised by large

sectors of society (Cillero and Bernales, 2002). The government began to work on a series of reform proposals and some politicians started to point out young offenders as the principal cause of delinquency increase in largest cities (Cortés, 2007). Also academics, NGOs and think-tanks showed interest in participating in the debate about the new Act. In general the academic world adopted a position of rights protection whereas some think-tanks (such as Paz Ciudadana Foundation) argued that young offenders usually went unpunished for their offences and called for tougher and longer punishment. These elements will be explored further in chapter 5 where I analyse the origins of the reform.

First draft bill of 1998

The first reform draft bill made by the Chilean government was finalised in 1998. UNICEF, the Inter-American Children's Institute and academics were involved in the preparation of this draft bill. Consequently, the final document largely followed the UNCRC requirements. The draft bill written by the executive in 1998 was characterised by minimising the use of imprisonment and by its observance of the UN Convention, the political constitution and other international agreements. The main features of this draft bill were:

- An attempt to impose minimal sentences. The maximum prison term was three years for serious offences.
- Protection measures that former Minors' Judges could apply were eliminated, ruling out the confusion between social care and crime punishment that characterised the old system.
- The project established coherence between the youth justice system and constitutional rights through the guarantee of due process for young offenders.

- The introduction of the concept of adolescents' penal responsibility for first time.

Although this draft bill was presented and disseminated among academics and institutions linked to childhood and adolescence, it was not considered by the legislature and thus did not pass into law. The reasons of this failure relate to governmental interests. In this period, political attention was on the passage of the new Criminal Procedure Code in parliament and the implementation of the Criminal Procedure Reform, postponing any other changes in criminal justice.

Partial modifications to update the national legislation to the UNCRC

i) Creation of Judicial Defence Programmes

The lack of effective legal defence for young offenders for the duration of the discernment proceeding was corrected by means of a series of specific programmes developed by the National Minors' Service. In 1990 this service created the National Programme for Behaviour Rehabilitation (Programa Nacional de Rehabilitación Conductual), the Judicial Assistance Service (Servicio de Atención Judicial-SAJ), the Psycho-social Assistance Service (Servicio de Atención Psico-social) and the Integrated Diagnosis Service (Servicio de Diagnóstico Integrado). All of these programmes had adolescents in remand at Preventive Detention Centres as beneficiaries. These programmes were the origin of the Judicial Defence Programmes which ran from 1995 until the youth justice reform that took effect in 2007.

Fernández (1994) assessed the Judicial Assistance Service's performance, evaluating the way in which this service took on the task of diverting young people from custody, considering the

special conditions that characterised the process for adolescents. The Judicial Assistance Service had among its goals:

- To achieve minors' freedom as soon as possible;
- To provide legal defence to young people declared to be "with discernment";
- To collaborate on the diagnosis stage through the analysis of judicial information about the case; and
- To encourage young offenders to engage with rehabilitation programmes if it was possible and appropriate.

In order to achieve these goals this service carried out some extra-judicial activities where their professional staff gained contact with young offenders and their families and also with institutions related to young offenders' treatment. In the judicial field this service dealt with the case in the same way that any lawyer would.

It was possible to identify three types of beneficiaries for the Judicial Attention Service:

- a) *Young people under discernment diagnosis.* For those adolescents who were awaiting trial, the service argued against custodial remand, and gave information and advice about the defendant's legal situation.
- b) *Young people without criminal liability* who were held in prison waiting for the document that allowed their freedom or that were waiting for a place in rehabilitation centres.
- c) *Young people 'with discernment' kept in custody.* The service started or continued the defence according to each situation. The defence lawyer looked for probation or some alternative punishment performed out of prison, with these objectives in mind the defender searched personal characteristics and made an analysis of the young person's participation in the offence in order to reinforce the

argument of low criminal involvement and low risk of re-offending.

The Judicial Defence and Psycho-social Support programmes were carried out by non-Governmental organisations that worked using a state subsidy given through the National Minors' Service. The main objective expressed at the beginning of this programme was as follows: *"to provide free, specialised and opportune legal assistance to minors who are or had been in custody because of the result of judicial proceedings carried out by Minors' or Criminal Courts"*. Also *"to create a psycho-social support programme oriented towards the humanisation of the way of life in the adult prisons where young offenders were kept in custody"* (SENAME, 2002). Additionally these projects intended to avoid or eliminate the excessive use of custody for young offenders and introduce the UN Convention rules in the defence.

ii) Changes stemming from the Criminal Procedure Reform (Act Nº 19.806 of 2002)

The implementation of the Reform to the Criminal Procedure (gradually put into practice between 2000 and 2005) brought about some changes to the Minors' Act. The discernment process specified in Article 28 of the Minors' Act was modified; the new article established that minors' judges and supervisory judges would share responsibility for the discernment process depending on the punishment that the Criminal Code specified for the offence investigated. If the Criminal Code establishes that the offence carried more than 541 days of imprisonment (minimum imprisonment at minimum level) the discernment decision was made by the Minors' Judge. If the Criminal Code gives a lower punishment or considers a non-custodial penalty as the appropriate measure, it is the supervisory judge who has to decide

about the adolescent's discernment³⁶.

Judges were given the power to remand young offenders in custody during the discernment procedure; this detention could only be executed in specialised centres for youth custody (Observation and diagnosis centres)³⁷. If an adolescent was declared 'with discernment', it was possible to remand him or her in adults' prisons, but in separate facilities from adult offenders and observing UNCRC's precepts about receiving humanitarian treatment and meeting their basic necessities³⁸. Young offenders could claim defendant rights declared in the Criminal Procedural Code with reference to:

- being informed about the offence they were accused of;
- having the assistance of a lawyer;
- asking the judge for judicial proceedings;
- offering a plea before the judge;
- exercising the right to silence;
- asking for their case to be dismissed;
- asking for release; and
- informing their families about their custody and receiving visits.

The modifications to the Minors' Law and the new criminal procedure did not bring an end to discernment proceeding but

³⁶ If someone older than 16 and younger than 18 years old was accused of committing an offence which was penalised with sentences higher to minimum imprisonment (from 61 up to 540 days), his or her discernment ability had to be decided by a minors' judge, procedure that had to be requested by the public prosecutor at the beginning of the investigation. In order to decide about this requirement, the minor's judge had to consider a report made by the National Minors' Services' technical board. The judge also had the obligation of considering other people involved in the process, and in any circumstances the judge had to inform the adolescent's defence lawyer. The decision had to be made in no more than 15 days. If the reason of arrest was a fault which did not contemplate imprisonment or the sentence was lower than the minimum term, the discernment decision had to be made by a supervisory judge, see Act 19,806. Sobre normas adecuatorias del sistema legal chileno a la reforma procesal penal (Adaptation of legal Chilean rules according to the criminal procedure reform).

³⁷ In zones where specialised centres did not exist, the offenders could be sent to some other kind of detention centre determined by the President.

³⁸ See Article 37 letter c of the UNCRC.

allowed supervisory judges to decide which sanction to apply in case of minor offences.

Youth Justice Reform in Numbers

This section discusses the use of official statistics to describe the youth crime phenomenon showing some tendencies and describing the main characteristics of young offenders.

Information about the youth justice system in Chile

In Chile the systematic publication of official statistics is a relatively new phenomenon. Similarly to other countries, police records of reports and arrests count as the main and most traditional source of information about crime. Among the advantages of this source of information we can mention that has great coverage and its maintenance in time. During the nineties the increased concern about crime stated in public opinion polls and the media led to the production of new sources of data in order to obtain knowledge about the trends of crime that was useful for implementing strategies of crime reduction. In that context the first versions of victimisation surveys were created. These surveys were first carried out by think-tanks and research institutes and currently there is a series of victimization surveys developed by the Institute of National Statistics (INE, Chilean equivalent to the UK Office of National Statistics). The first survey was carried out in 2003 and it has been repeated annually since 2005.

As it happens in other countries, in Chile data suggesting an increase on crime levels is taken as an *actual* rise on criminality by the major part of the media and politicians. Face with this situation, it would be useful to link data about crime to the institutional and political circumstances at the time of recording the data. For example, in times when students protest, like in the

first semester of 2006 when a big number of students protested for several months in order to promote reforms to the Act that regulated education, the police will probably record a higher number of young people arrested, if we look at those figures as a whole it would seem that youth crime had a big increase but if we look at the numbers in detail we can notice that a good part of the increase is related to public disorder charges.

Police records present a problem in the case of children and adolescents arrested as the data is accessible in ranges of age that differ to the ages in which adolescents can be held responsible for their offences. While in police records the ranges 0-16; 16-17; 18-20 and 21 and over, the Minors' Act established the possibility of penal liability for young people between 16 and 18 years old. Below a table containing the total of arrests of adults and adolescents between 1990 and 2005 is shown, in all the years apart from 2002 the proportion of adolescents is less than 10% from the total of arrests.

Table 8 Arrests carried out by the police between 1990 and 2005

Year	Total	Adults	14-17 years	% Adults	% 14-17 years
1990	637.986	589.150	41044	92,3%	6,4%
1991	715.547	660.135	47831	92,3%	6,7%
1992	758.969	704.150	46364	92,8%	6,1%
1993	723.375	680.815	33955	94,1%	4,7%
1994	703.602	663.790	30488	94,3%	4,3%
1995	699.206	656.165	33544	93,8%	4,8%
1996	695.893	647.490	39017	93,0%	5,6%
1997	684.735	633.065	41921	92,5%	6,1%
1998	593.766	544.875	39430	91,8%	6,6%
1999	704.716	644.265	49254	91,4%	7,0%
2000	686.848	634.859	41960	92,4%	6,1%

2001	656.594	589.175	56969	89,7%	8,7%
2002	506.845	444.453	51841	87,7%	10,2%
2003	525.244	463.553	50138	88,3%	9,5%
2004	502.699	445.562	48086	88,6%	9,6%
2005	511.449	459.295	45116	89,8%	8,8%

Source: Ministry of Justice 2006

According to data gathered by the Public Penal Defence Service, during the first three years of the youth justice reform that institution has received 94.030 cases of young defendants. The first year they provided defence for 28.916 cases, the second year 32.316 and the third year 32.798 cases, registering an increase of 39% their workload during this initial time.

The Public Prosecutor Office also produces a series of statistics about the number of cases that they prosecute every year. The following table shows the number of cases where adolescents are involved (national level):

Table 9 Cases of prosecution that include young offenders

Year	Age of defendants		Total
	14-15	16-17	
2008	22,665	40,096	70,761
2009	18,286	40,256	58,542
2010	16,990	36,438	53,428
2011	20,097	42,850	62,957

Source: Data compiled from Statistic Bulletins of the Public Prosecutor Office
years 2008-2011

The first observation that can be made from this data confirms what several actors mentioned in the interviews and what can be found in the literature: the statistics differ, sometimes dramatically, even though they are supposed to deal with the same people or cases. This can be explained because of the

emphasis that each institution gives to different stages of the process and their decision of recording by person, by case or by offence.

The National Minors Service registers the numbers of young people that have been sentenced under the new Act. The tables below show the numbers and ages of the offenders for the years 2009-2011:

Table 10 Adolescents serving a sentence registered by the National Minors' Service 2009

2009				
	Males	Females	Total	%
14-15	1,497	190	1,687	14%
16-17	5,447	568	6,015	50%
18+	3,944	304	4,248	36%
Total	10,888	1,062	11,950	100%

Source: National Minors' Service

Table 11 Adolescents serving a sentence registered by the National Minors' Service 2010

2010				
	Males	Females	Total	%
14-15	1,311	181	1,492	12%
16-17	5,397	614	6,011	47%
18+	4,932	440	5,372	42%
Total	11,640	1,235	12,875	100%

Source: National Minors' Service

Table 12 Adolescents serving a sentence registered by the National Minors' Service 2011

2011				
	Males	Females	Total	%
14-15	1316	189	1505	11%
16-17	5564	675	6239	45%
18+	5435	556	5991	44%
Total	12315	1420	13735	100%

Source: National Minors' Service

This data show a difference in the amount of offenders according to age suggesting that the range 16-17 years old, and young people over 18 years old, are more commonly serving sentences. There is also a majority of males in the system. Both trends are also observed in the data provided by the Public Defence Service and the Public Prosecutor Office.

The more common offences in the case of adolescents serving a measure of those recorded in the National Minors Service Database are offences against private property including all types of robbery and theft (being theft the most frequent), this offences count for 75% to 78% of the cases in the period 2009-2011. Far behind there are cases of offences against the physical integrity of persons (with around 6% of the cases), drug related offences (2%) and carrying weapons (2%).

The use of deprivation of liberty as provisory measure has decreased since the implementation of the Act, but it is still soon to confirm a permanent trend about this with the data available at the moment of writing this thesis. The use of deprivation of liberty as sentence is showing an opposite direction and has increased between 2008 and 2012, as shown in table 13 below.

Table 13 Adolescents in provisional custody and serving a custodial sentence

Year	Provisional custody	Custodial sentence
2008	897	228
2009	812	608
2010	812	637
2011	528	799
2012	570	679

Source: SENAME, 2012

Overall, the most used sentences are the ones carried out in liberty. This is explained by the type of offences that are more commonly committed by adolescents. Table number 14 shows the details for type of sentence between 2008 and 2011, where the increase of use of community service can be seen, as well as certain stability for the use of deprivation of liberty, which stays around 5%.

Table 14 Type of sentences being served between 2008 and 2011

Sentence being served	2008	%	2009	%	2010	%	2011	%
Deprivation of liberty	528	6.5	483	5.2	544	4.8	390	4.4
Partial deprivation of liberty	533	6.5	452	4.8	551	4.8	420	4.7
Assisted liberty	1750	21.5	1880	20.1	1907	16.8	1566	17.7
Special assisted liberty	2919	35.8	2827	30.2	2770	24.3	2205	24.9
Community services	2426	29.7	3734	39.8	5609	49.3	4287	48.3
Total	8156	100	9376	100.0	11381	100.0	8868	100.0

Source: SENAME, 2012

Currently, there is no information provided by the government about re-offending rates. Below, there is a table extracted from the only study about young people reoffending carried out in Chile until now by Fundación Paz Ciudadana in 2010. It is noticeable that around 70% of young offenders between 15 and 18 years old are prosecuted for another offence, although

prosecution not always ends in a new sentence. This study also showed that the more time pass after an adolescent offends the probability of reoffending diminishes.

Table 15 Reoffending rates by age

Reoffending rate by age of the offender		
Age	Any new prosecution	New sentence
14 y.o.	64,0%	47,3%
15 y.o.	71,5%	57,3%
16 y.o.	71,4%	57,5%
17 y.o.	71,1%	56,0%
18 y.o.	67,0%	51,9%
18 +	71,0%	53,7%
Total	70,1%	55,2%

Source: Paz Ciudadana, 2010

Finally, there is a generalised belief that children and adolescents that had been in care end as young offenders. The National Minors' Service challenges this perception in a report published in 2011. This report establishes that the number of youngsters aged between 14 and 17 years old that have spent time in care and later go into juvenile detention centres are a minority, 7.9% equivalent to 1588 adolescents in 2009. Although a considerable number of adolescents that commit offences have passed time in care, not the majority of young people that have been in care commit offences.

Chapter 4: Methodology

This chapter describes the way in which this research has been planned and carried out, illustrating the methodological decisions taken during development of the thesis. The chapter is in three parts. Section One sets out the research questions and the ways in which the thesis was developed and revised. Section Two outlines the research strategy, explaining the reasons for choosing a mixed methods approach. Section Three discusses ethical considerations taken into account in the research.

4.1 Introduction

Research questions

As described in the introductory chapter, the main objective of this research is to analyse changes in the youth justice system in Chile and how this changes were originated. My interest in this topic arose during my internship in the Minors' Department at the Chilean Ministry of Justice in 2005-2006. At that time the government was assessing the possible effects of reforming the way in which the criminal justice system deals with young people. There was intense debate about the scope of the new legislation and its implications. I believed that a comparison of the old and the current way of dealing with juvenile crime would be an interesting focus for a research study. At the same time the origins of the legislative changes that guide changes in the procedure became a topic of interest. Thus, the thesis is organised around two main areas: policy change and the policy-making process and changes on youth crime procedure.

The main question that this thesis seeks to answer is:

How the Chilean youth justice system has changed since the last reform?

This question could be tackled in a number of ways, ranging from an analysis of the legislation to qualitative research aiming at young people accounts of their experiences before and after the implementation of the Act on Adolescents Penal Responsibility. The approach I take focuses on two main issues. First, how and why reform to the youth justice system was considered necessary and second, what are the differences between criminal procedure in practice and the formal modifications made by law.

Therefore, with the purpose of delimiting this broad question, I stated secondary questions:

- How and why reform to the youth justice system was considered necessary?
- What are the differences between criminal procedure in practice and the formal modifications made by law?
- What are the ideas and beliefs that guided the youth justice reform process

Secondary objectives of the thesis related to more practical aspects of the youth justice system. These were to:

1. Characterise the main organisational features of the pre-reform youth criminal procedure in Chile, comparing it with the system after reform
2. Explore if the actors of the youth justice system integrate in their discourses the idea of the child as a subject of rights proposed in the United Nations Convention on the Rights of the Child (UNCRC).

The hypotheses underpinning these questions are that:

- i) Young people's personal characteristics have an impact on the outcomes of the judicial process both in pre- and post-reform periods.

Findings from preliminary analysis of quantitative data for the pre-reform

period suggest that socio-economic and psychological characteristics of adolescents are related to different outcomes. Young people's personal characteristics were evaluated and recorded in "psycho-social reports" which aimed to establish whether they were responsible for their actions. This analysis (drawing on information gathered while working for the German Agency for Cooperation and the Ministry of Justice in Chile in 2005) sought to identify young people's vulnerabilities and the factors putting them at risk of reoffending. The hypothesis is based on evidence of differential treatment or discrimination in the justice system based on non-legal reasons, or due to people's personal characteristics (see for example Bowling and Phillips, 2002; Heidensohn and Gelsthorpe, 2002, Feilzer and Hood, 2004, May et al., 2010).

ii) Youth justice reform contributes to changes in trends in legal reasoning, found in young offenders' case files, based on the idea of the child as the subject of rights proposed in the UNCRC.

The UNCRC requirements created a new semi-specialised youth justice system³⁹. This was aimed at ensuring that fundamental rights are observed when establishing whether a young person is responsible for a crime. It was hypothesised that this new legal context should change how actors in the youth justice system understand youth crime. In consequence, judicial arguments should also change. Additionally, a different set of sentences, including community-based measures, was also available under the new act. This could lead to changes in the use of custodial sentences.

iii) Ideas and beliefs held by the political elite influence the direction that policies take. When highly contradictory positions are struggling for putting their views forward actors tend to organise themselves (either formally or casually) in *advocacy coalitions* (Sabatier 1987, Sabatier and Jenkins-Smith 1993) that would use their resources to make their

³⁹ Although the UN does not establish specialisation as something compulsory, the Chilean legislation considers that the institutions dealing with youth crime should have specialised human resources and systems, completely dedicated to work on youth justice.

positions strong. This is observed during the parliamentary debate of the Act for which I identified a group supporting the adaptation of local law to the precepts of the UNCRC and other group holding a punitive perspective to deal with youth crime.

Plans and reality

To address the first research question (how the Chilean youth justice system has changed since the last reform) I originally planned to make extensive use of quantitative data, with analysis of policy documents as a complementary element. The quantitative data was to be extracted from young people's criminal files. The plan was to describe the criminal process from the point of arrest to the passing of sentence by the court. When I planned the research I was in possession of a sample of files for the period from 2002 to 2004. My aim was to obtain a comparable database covering a sample of cases dealt with between the start of the youth justice reforms (June 2007) and March 2009.

Staff in the Office of the Public Prosecutor provided agreement in principle to data collection in early 2008, and confirmed this later in the year. However, by early 2009, when I was ready to begin fieldwork, the person who had given permission for data collection was no longer in post, and support for the study had reduced. In addition, new legislation about access to public information had just been enacted. Permissions therefore had to be requested again, considerably delaying data collection.

Eventually I was given access to a sample of young people's judicial files. I was also provided with information about judges' decisions by the National Minors' Service⁴⁰. However, I was unable to obtain a comparable sample of files. To enable reliable comparison of the two samples, I required almost

⁴⁰ The National Minors' Service (in Spanish the "Servicio Nacional de Menores", or SENAME) is a government agency created in 1979. It assists the judicial system through the management of performance measures determined by courts. The service manages some care and imprisonment centres for children and young people. However, most are managed by independent organisations which receive a subsidy for each child attended.

four hundred files. Due to new regulations governing access to data, I needed the approval of all defendants and victims involved in cases. Officials from the Office of the Public Prosecutor contacted those involved in every case on my behalf, seeking this permission. However, resource pressures meant that the officials set a limit of 150 files. Only a minority of those approached agreed to participate. As a result, my original proposed sample of 385 files was reduced to a total of 51 complete cases.

This prevented robust comparisons between the two datasets. It also limited the research, as I could not address all the objectives based only on information about formal criminal procedure recorded in judicial files. Specifically, I could not clarify the context for differences between the old and new way of understanding and dealing with young people committing criminal offences.

These issues led me to consider using mixed methods to accomplish the objectives of the study. I decided to supplement the quantitative datasets with analysis of two additional data sources: qualitative analysis of material in case files and qualitative analysis of semi-structured interviews with elite respondents.

The difficulties encountered in developing the research are by no means unusual. As Baldwin (2000: p 254) pointed out, research reports typically offer a tidy and simple image of the research process, which often does not correspond to reality. This is particularly true of investigations covering sensitive fields such as crime and justice. Limited access to information, and constant negotiation with gatekeepers of information can be tiring, frustrating and create delays to research schedules⁴¹.

Finally, I was able to carry out the description of the procedure using information from judicial cases only in a qualitative form and supported by information collected in other studies (especially Riego and Tsukame 1998

41 Something similar could occur when the reports are written and ready for publication. Some may not agree with the orientation of the report, or the results presented.

and Jiménez 2000). For the period previous to the implementation of the current Act I also used multivariable analysis in order to show the influence of extra-legal elements in the decision making process carried out in the minors' courts. The findings of this analysis are presented in chapter 6.

4.2 Research strategies and research design

Mixed methods

Qualitative and quantitative research methods have strengths and weaknesses. One solution to this is to combine both methods. This can neutralise limitations and make the most of both approaches; however, many authors argue that such combination is neither possible nor desirable. For example, Bryman (2008, p 603) noted the following principal arguments against mixed methods:

- The selection of a research method implies an epistemological commitment. In other words, each approach employs a particular way of seeing and interpreting the world, and uses specific instruments to achieve its goals.
- Qualitative and quantitative approaches to research represent separate paradigms, or sets of beliefs influencing how scientists carry out research. The concept of paradigms was established by Kuhn (2001) in “The Structure of Scientific Revolutions”, his 1962 study of how scientific revolutions were made. His main point- that certain kinds of comparison between paradigms are impossible (or “incommensurable”)- has subsequently been fiercely debated by other commentators.

Howe (1988) suggested that two theses lay behind the conflict between qualitative and quantitative researchers. First, incompatibility thesis, which states that compatibility between methods is illusory, and based on a “what works” approach. Second, compatibility thesis, which holds that the two

methods are not actually separable. This lack of separability is mainly because the assumption of incompatibility at the epistemological level is based on a non-accurate matching between, on the one hand, positivism and quantitative methods, and, on the other hand, interpretivism and qualitative methods.

Similarly, Bryman noted that in practice there are two approaches to the debate about the use of mixed methods. Some researchers believe that both strategies are impossible to combine, due to epistemological or paradigmatic reasons. Other researchers see no difficulty in using both methods in a single study; for them, the epistemological issues involved are soluble.

Despite the opposition to the use of mixed methods, since the early 1980s there has been an increase in the number of studies using this approach (for example, Bryman 2006; Leech and Onwuegbuzie, 2007). The strategy does not simply combine qualitative and quantitative approaches in the same investigation; the methods must be integrated, creating a synthesis (Bottoms, 2000; Yin, 2006), and the strategy geared towards answering the specific research questions.

I consider the use of mixed methods an appropriate approach to my research questions. I have two main interests: how the Chilean youth justice was conceived, and how reform has changed procedures in practice. Both themes can be answered using mixed methods. Interviews add value to the study, as the changes I explore are recent, and the body of research on Chilean youth justice reform is currently slim.

Case studies as research strategy: Youth justice reform as case study

Having settled on a mix of quantitative and qualitative methods in my study, I chose to collect data through case studies (Page, 2006, Yin, 2006, 2009), defined as:

“An empirical inquiry that investigates a contemporary phenomenon in depth and within its real life context, especially when the boundaries between phenomenon and context are not clearly evident” (Yin, 2009: 18).

The case study approach has been applied in various contexts, ranging from concrete subjects such as individuals, small groups or organisations, to less tangible topics including communities, relationships and decisions.

Light (1979) and Yin (2009) have both noted that research methods should be chosen according to the research questions. Yin added that three criteria assist in determining the most suitable research method:

1. The type of research questions. The exploratory or explanatory nature of the questions will influence the kind of method. Exploratory questions (*who, what, where, how many, and how much*) can be addressed through surveys. Explanatory questions can be answered using case studies or historiography.
2. The degree of researcher control over behavioural events. This ranges from total control in the case of experimental research, to no control in archival analysis or case studies.
3. The temporal focus. Are the phenomena contemporary or did they occur in the past? Some methods can be used to study historical facts, others to investigate a recent event.

Yin classified research methods as shown in Table 9 below.

Table 16 Relevant situations for different research methods

METHOD	Form of research question	Requires control of behavioural events?	Focuses on contemporary events
Experiment	how, why?	yes	yes
Survey	who, what, where, how many, how much?	no	yes
Archival Analysis	who, what, where, how many, how much?	no	yes/no
History	how, why?	no	no
Case Study	how, why?	no	yes

Source: Yin 2009, p 8.

Yin (2009) noted a series of criticisms of case studies. The first is that some show little rigour; Yin highlights the short life of case studies as a research strategy, and the lack of a systematic method compared with qualitative and quantitative research. Coupled with this, case studies as a research method may be confused with case study teaching where, to make a point more effectively, materials may be changed deliberately.

A second, deeper criticism centres on the limited basis for scientific generalisation that case studies provide (see Rueschemeyer, 2003; Gomm et al., 2009; Yin, 2009). According to Yin (2009) the goal of case research is to “expand and generalise *theories*” (15, emphasis added) and not to make inferences about populations, which is the concern of statistical generalisation. Yin refers to this as “analytic generalisation”, with theory used

“as a template with which to compare the empirical results of the case study” (38).

The third criticism focuses on the length of time that case studies can take, and the size of the reports which can result from them, depending on how different research elements are used.

Yin (46-55) categorised case studies in a fourfold typology, according to the number of cases and units of analysis each contains:

1. Holistic single-case studies. These cover a single case and one unit of analysis. They are usually related to general topics in which an abstract analysis is possible and no sub-units are identifiable.
2. Embedded single-case studies. These use multiple units of analysis. The researcher is interested in observing specific phenomena within the case.
3. Holistic multiple-case studies. These contain multiple cases and a single unit of analysis. Every case should predict similar results or predict contrasting results for anticipated reasons (theoretical replication).
4. Embedded multiple-case studies. These include multiple cases and multiple units of analysis.

Single-case studies are used when:

- a case is a critical one and can be used to test a theory;
- a case is extreme or unique;
- a case is representative or typical
- a case is revelatory, and a phenomenon is for the first time

accessible to study; and

- the research is longitudinal, involving several observations of the same case at different times.

This study deals with a contemporary phenomenon. The main issue it seeks to address is how the Chilean youth justice system has changed, and why subsequent transformations took place. The reform to the youth justice system is considered as a single case with unique and revelatory characteristics, with two units of analysis. Therefore, using Yin's classification, this is an embedded single-case study. It does not conceptualise clear limits between the decisions affecting the Chilean youth justice system and elements of the context of this phenomenon, such as politics, public order and poverty.

In principle, inquiries in case studies have "many more variables than data points, and as one result [this method] relies on multiple sources of evidence" (Yin, 2009: 18). Yin stated that multiple sources of evidence (data triangulation) is a good strategy for evaluating the quality of research design. It should explain phenomena in a coherent way, and not produce data and findings that lead to different conclusions, transforming the study into a series of different studies. Other ways of testing the quality of a study and avoiding bias include investigator triangulation (make sure that a number of researchers have an input into the work), theory triangulation and methodological triangulation.

Bearing this in mind, I collected data from two sources. First, elite interviews, in order to recreate the context in which the youth justice reform was formulated. Second, judicial cases of young people in the justice system, with the aim of analysing differences in practice before and after reform.

Units of analysis

The units of analysis derive from the research questions and determine the data collection strategies. In short, they refer to *what* is being studied. In my investigation there are two units of analysis:

- How the youth justice reform was conceived, and the differences between the former and the current treatment of young people in the system of justice. Analysis is through interviews, review of the literature review and scrutiny of official documents.
- The criminal process, explored through analysis of judicial files of young people in the Chilean justice system.

Below I describe the kind of data I assembled and, following this, the data analysis plan.

Quantitative Data: Judicial files of young people in the youth justice system

i) Pre-reform period

This database provides baseline information for my thesis. Along with others, I constructed it while working for the German Agency for Cooperation (GTZ), as part of a “Justice Reform” initiative conducted with the Chilean Ministry of Justice in 2005 in Santiago de Chile. It contains cases dealt with by all Minors’ courts in the city between 2002 and 2004. I was involved in the design of the database, and checked and cleaned data. I was also part of the team that conducted statistical analysis, and helped prepare the final report.

Data for the GTZ study were collected directly from Minors’ and Criminal Courts and the Judicial Archive. Case files were paper based and were

photocopied by members of the work team for later analysis. Cases were sampled from the administrative register of cases managed by the organisations in charge of the judicial defence of young offenders.

The GTZ sample was probabilistic and stratified, using the year in which cases were presented to the Court as the stratification variable. The confidence level was 95 per cent. After deciding on the required sample, a five per cent oversample was calculated, to allow for finding incomplete case files. The final number of cases obtained was 327.

ii) Reform period

To obtain a new sample with the same characteristics as the original one, I first located all finished (sentenced) cases of young people seen by the Office of the Public Prosecutor between June 2007 and March 2009. This period represented the first two years after the implementation of the Youth Justice Reform. This amounted to 7,828 judicial cases. The sample size obtained (using a 95% confidence level) was 385 cases. As discussed above, my final sample comprised 62 cases.

To supplement material from these files, I secured access to a dataset built by the National Minors' Service. This housed information relating to the sentences determined for each case. The dataset also included socio-economic information on the young offenders. This was useful because psycho-social reports, made on individuals under the previous system, were not included following the reforms. Matching cases from both institutions, I obtained a final total of 51 complete cases.

Qualitative Data: History of the Law, annual presidential speeches, elite interviews and judicial files of young people in the youth justice system

i) History of the Law

The History of the Law is a document containing details of parliamentary debates of Acts. These documents are produced by the Parliament itself. A narrator describes the contents, then summarises the comments of senators and members of parliament.

For this research, two volumes of the History of the Law were used: the History of the Law 20084 and The History of the Law 20191. The first documents parliamentary discussion; the second contains the modifications presented before implementation. Each document includes a “Message from the Executive” in which the president presents and briefly justifies the contents of the draft under consideration. The draft is then discussed by a committee of members of parliament (the “Constitutional Committee”), which produces a further draft for discussed with the remaining members in an ordinary session. Once all revisions are made, the Act is sent to the Senate, which carries out a similar procedure. If both chambers disagree about the contents of the law, a joint committee is created to solve the differences. When agreement is reached, the Act is printed in the Official Newspaper for consumption by all members of the public.

ii) Annual presidential speeches

On 21 May each year, the president makes a speech to members of the parliament and other authorities. The purpose is to raise the major problems and achievements of the previous year, along with plans for the next parliamentary period. I included these speeches as data, to gather a sense of the importance of criminal issues in the government’s annual planning. There are several mentions of citizens’ security, the role of the police, and

crime control and the ways it, and youth crime, would be addressed. Transcripts of these speeches are the most formal and authoritative way in which the government refers to national plans, difficulties and accomplishments. For this reason, they have been used to shed light on government decisions, and to provide a comparison with information obtained from History of the Law documents.

iii) Elite interviews

Interviews can be classified within a range from completely structured (close-ended questionnaires) to completely unstructured (ethnographic interviews). In this research I used semi-structured interviews. These contain a certain number of topics, which the researcher is interested in exploring deeply in order to obtain meaningful information related to the research objectives.

To ensure that the interviewer covers all the necessary topics, an interview guide or set of open-ended questions is usually employed. Semi-structured interviews are characterised by their flexibility, and allow follow-up questions, or changes in question order during the interview, depending on the material emerging.

My plan was to interview high-level civil servants, politicians, policy makers and directors of institutions dealing with young offenders. As several commentators have noted (see Aberbach and Rockman, 2002; Berry, 2002; Goldstein, 2002) this target group creates particular potential difficulties:

- having access only to particular types of interviewee could increase the risk of systematic error. In this study, I was not able to interview any member of parliament;
- the quality of the questions and the way in which they are formulated can both affect the richness of the results obtained;
- the interviewer may need special knowledge and capabilities in

order to effectively interview elite interviewees; and

- interviewees' responses may be especially passionate or forthright, which may place particular requirements on the researcher to treat them in a balanced fashion.

For the selection of participants I used *purposive sampling*, a type of non-probability sampling in which the interviewees are chosen strategically because of their relevance to the research questions guiding the study. The purpose of the interviews was to explain how the process of reform was carried out. A sample of interviewees was therefore needed which would represent those in positions in the youth justice system. To assemble this sample, I developed a sociological map based on the literature review and media coverage of the subject. Due to the difficulty I would have encountered if attempting to access interviewees myself, I used a *snowball* technique, with interviewees acting as contacts who provided me with access to other interviewees.

Interviews were structured around two principal issues:

- *how* the youth justice reform was developed; and
- interviewees' opinions of *why* reform developed as it did.

Responses drew on interviewees' personal experience working in different positions in the judicial system. Most had played some part in the public and parliamentary debate about the new legislation, or on special committees where the changes were discussed before and during the act's implementation.

In all, 18 semi-structured elite interviews were held, as follows:

Government and Governmental agencies – five interviewees

Office of the Public Prosecutor – one interviewee

Judiciary

- two judges of the Penal Tribunal (Crown Court)
- three Supervisory Judges (Magistrates' Court)

Academics – three interviewees

Non-Governmental Organisations or Foundations – four interviewees

To report data from the interviews I described the interviewees according to their affiliation. I created four groups (Academics and experts, civil society, policy makers and policy officers and judiciary and institutions of justice) and gave every person a number. This was done in order to protect the anonymity of the interviewees.

The interviews were carried out in Santiago de Chile and Buenos Aires, Argentina, between mid-April and August 2009, and in January 2010. These lasted for between 40 and 90 minutes. All were recorded with the permission of the interviewees, and were conducted in their offices.

iv) Judicial cases of young people

I used the sample of young people's judicial cases to carry out qualitative analysis of the files in order to improve and complement the analysis. I compared the characteristics of the legal process before and after reform, analysing the legal reasoning contained in the files. To do this I selected a sub-sample of 50 files for each stage, proportionally, according to the type of

crimes recorded.

4.3 Ethical considerations

Any research involving human participation must consider ethical aspects that guarantee a fair relationship between researchers and participants. A fair relationship should ensure that participants have sufficient information about the investigation and the extent of their role.

The participation of the individuals in this study required the approval of King's College Law Research Ethics Panel. Use of judicial files did not need College approval, but had to be in accordance with Chilean legislation on data protection. In Chile the limits to the freedom of information are the right to have privacy and observe people's reputation. The law stating the courts' functions and administration indicates clearly that documents produced by courts are public and are available for any citizen interested in this information. According to the Organic Code of Courts (Article Number 9), "The actions of Courts are public, save the exceptions expressly established by law". There are some exceptions to freedom of information in the case of judicial information. Judges can impose secrecy in special situations (such as secret voting in the Supreme Court, for information considered dangerous by the Council of National Security, and in a state of emergency). In the case of children, judicial information about offences could be limited if its disclosure damages the rights of children involved.

I took account of these rules during the data collection phase of this study. All Chilean laws were observed, and the database I created has been anonymised. The presentation of data in this work, or in any publication related to this research, will respect the anonymity of the people involved.

The King's College Law Research Ethics Panel examined my application for approval in March 2009. After some amendments to the participant information sheet requested by the Panel, it gave full approval at the end of

April 2009.

As noted, the original plan for this research was modified for access reasons. I began developing the study with a database containing information on young people during the period preceding youth justice reform. Details in this dataset were extracted in 2004-2005, and were obtained from a sample of young offenders' legal files. Details have been anonymised, and I have gained permission to use these data, and the judicial files from which the information was obtained, from the Ministry of Justice of Chile.

A second sample of cases was required to allow comparison between the pre-reform period and the new youth justice system. This sample was provided by the Office of the Public Prosecutor under new legislation about access to public information. Act number 20.285 has been in force since April 20 2009 and is based on Subsection 2 of the Chilean Political Constitution.

The Office of the Public Prosecutor did not possess an anonymised register of cases. Therefore, to compile the database, I required permission to review each file from all defendants and victims involved in each case. Permission was obtained through the Office of the Public Prosecutor, which sent a letter to each person. I then made personal visits (initially alone, and subsequently with the help of an assistant) to each local office, to inspect files and construct an anonymised database. I also obtained an electronic copy of each file, each of which has been protected with two different passwords (one protects access to the file; the other prevents unauthorised copying and printing), using Adobe Acrobat Professional software.

The interviews with key informants took place in Santiago de Chile and Buenos Aires, Argentina. There were carried out always in the interviewees' offices and took between forty and one hour and a half. There were recorded with the permission of interviewees.

4.4 Data analysis methods

Yin (2009: 126-7) points out that analysing data in a case study could be difficult due to the lack of established techniques. An analytic strategy illustrating what is important to analyse and why a certain type of analysis is preferred are necessary.

A useful way of understanding the importance of having an analytic strategy is remembering that every study has "a story to tell" (Yin, 2009: 130). This story has beginning, development and end and the elements or content of it is given by the evidence collected during the research period.

The analysis plan considers the following elements:

- Theoretical propositions: research questions, literature review, propositions and hypothesis
- Developing a descriptive framework for organizing the case study
- Using both quantitative and qualitative data as means to "tell the story"

I used two software packages to assist my analysis. In the case of quantitative data I made use of the statistical package SPSS 17.0. For assisting the qualitative data analysis I employed NVivo 9 and 10.

Below I describe the methods used to analyse the data collected during the fieldwork.

Analysis of qualitative data

Introduction

This section contains a report of what was done to analyse both collected and secondary qualitative data. It also describes the methods used in order to carry out the analysis.

As mentioned before, my main research question focuses on finding how and why a reform to the youth justice was considered to be necessary and how this process has changed (or not) practices and outcomes of the system. With these purposes in mind I analysed four sources of qualitative data:

- The history of the laws No. 20084 and No. 20191: these documents are an official collection of the parliamentary debates carried out between 2002 and 2007.
- Annual presidential speeches from 1998 (the year in which the first draft of the act was produced by the government) to 2008 (the year of the act's implementation).
- Elite interviews with policy makers, high level civil servants, stakeholders and other experts.
- Young people's judicial cases collected for pre and post reform stages.

Using these sources and the revision of literature, I reconstruct how youth justice reform in Chile was carried out, what kind of outcomes were produced and I identify the beliefs and practices of different actors from the criminal justice system and associated organisations relating to youth crime. In order to do this I needed at least two approaches to qualitative data analysis. On one hand, I needed to contrast information about the enactment process and its results as the existing literature still does not give an insightful account of those aspects. On the other hand, I was seeking for a deeper account of actors' beliefs and their positions about youth crime. For these reasons I used two methods of qualitative analysis. On the one hand, thematic analysis used essentially to discover topics and find information about the youth justice system and on the other hand critical discourse analysis to describe social relations and structures using the available data. A brief description of these approaches and the results are presented below.

Typological analysis

Qualitative methods of research are particularly helpful for improving the understanding of the context in which phenomena are developed. As Noaks and Wincup explain, qualitative research offers “rich and detailed data to flesh out the bare skeleton provided by quantitative data” (Noaks and Wincup, 2004: 14). In cases where availability of quantitative data is scarce and its quality cannot be guarantee, as in the case of the Chilean criminal system, it is crucial to include complementary sources that help to reveal the rationale that guide decisions that quantitative data shows.

The approach I use for analysing qualitative data is mainly typological (see Hatch, 2002). This approach to organising and interrogating the data consists basically of allocating data into categories inspired in typologies. The typologies are generated from theory, research objectives and from topics found in the data itself. Although typological analysis is mainly of a deductive nature it does not rule out inductive processes proper of qualitative

analysis. The typologies used for analysing the contents of interviews and the parliamentary debate were based on the literature and the contents of this data. The quantity of information was vast (interviews lasted between 40 and 90 minutes and the transcriptions of parliamentary debates sum about 1500 pages) and the topics discussed were diverse. In order to make sense of the data from qualitative sources I organised emergent topics into two big areas: Accounts related to the policy process and accounts describing “how things work” in practice.

In the group of views about the development of the policy process I identified two areas of interest: views that expressed what the actors consider as the main causes of youth crime and views about what they think are the best ways of tackling the youth crime problem. The results of this analysis are reported in chapter 5. These findings are presented separately for each coalition of advocates.

For the description of how the system works in practice I relied mainly on the accounts of members of the judiciary and in the contents of young people judicial files. The details of this are presented in chapter 6 and are organised following the typical steps of the criminal procedure, starting with the moment of contact with the police and finishing with sentencing.

I also borrowed elements from narrative and critical discourse analysis in order to identify beliefs of actors in their narrative accounts of the reform process and to categorise assumptions given as justification for the different positions expressed during the debate of the Act in the Parliament.

There is no consensus in the literature about what the characteristics of narrative analysis are. In general it includes the analysis of life stories or biographical accounts but also can refer to a broader approach that according to Bryman is sensitive to finding connections between people's

temporal accounts of events and the sense that they make of those connections (Bryman, 2008: 553).

This wide approach is the one that I take for analysing the elite interviews. These interviews contain a considerable amount of data about particular events that happened before and during the implementation of the Act on Adolescents Penal Responsibility. The interviews are based around key topics that are related to theoretical points that are included in the typologies analysis described above. The historical and personal elements present in the data are better suited to narrative analysis as they are stories about the experiences that the interviewees lived through during the reform process. Because they are active participants they talk from their role and they see the topics addressed in the interviews through their own values and positions in the criminal system.

Using these elements helps to identify competing understandings of the topics discussed and how these understandings shape the relationships between different institutions dealing with young offenders. In other words, this analysis allows focusing in the different "narratives"⁴² that every group constructs and uses in their practice. According to Brown, every individual needs to represent and organise the complexity of interpersonal interactions and events experienced. These representations take the form of organised accounts and are shaped as narratives that could be expressed in the form of stories, myths, reasons for doing or avoiding something doing it, etc. (Brown, 1998: 36). When asking key informants about their experiences and how they evaluate the general context and their personal involvement in the youth justice system they offer their narratives which I categorised in two main groups: in one group, narratives and beliefs supporting children's rights

⁴² "Narrative is a conventional form, transmitted culturally and constrained by each individual's level of mastery and by his conglomerate of prosthetic devices, colleagues, and mentors. Unlike the constructions generated by logical and scientific procedures that can be weeded out by falsification, narrative constructions can only achieve "verisimilitude." Narratives, then, are a version of reality whose acceptability is governed by convention and "narrative necessity" rather than by empirical verification and logical requiredness" (Bruner, 1991: 4)

are gathered together and in the other group, narratives that give importance to citizens security are grouped (see chapter 5 below)

For Polkinghorne (1995) narrative analysis is relevant because the memories that are transmitted in form of stories “retain the complexity of the situation in which an action was undertaken and the emotional and motivational meaning connected with it.”(1995: 11). In other words, narratives offer a valuable approach to the beliefs that guide actors’ practices, an aspect that this work tries to identify in order to understand the evolution of the guiding principles of the reform from children’s rights to citizens security as the most valued outcome of the youth justice system.

When carrying out this analysis I looked for:

- Themes pertinent to the reform: from the paradigmatic or general coding.
- Ideology: from tutelary regime to responsibility centred system and the ideas behind that. Assumptions about crime and young people that justify a penal populist approach.
- Storyline: from the UNCRC and before to the reform. "After the denouement is identified, the researcher can work directly with the data elements. A first step in configuring the data into a story is to arrange the data elements chronologically. The next step is to identify which elements are contributors to the outcome. Then the researcher looks for connections of cause and influence among the events and begins to identify action elements by providing the "because of" and "in order to" reasons (Schutz & Luckmann, 1973) for which they were undertaken." (18)

Both narrative account and qualitative analysis imply a permanent dialogue between data, theory and context. This dialogue helps to identify the relevant

aspects of the data for putting together the story or explanation of research topics. In practical terms this analysis uses these themes, patterns and relationships with the aim of gathering elements that allow telling the story of the research topic.

The basic procedure employed to go from raw data to a meaningful account about the reform and its development was the method of the “three C’s” of data analysis from coding to categorising to conceptualising as described by Lichtman (2006: 167-168). The process of generating codes, categorising them and the creation and discovering of concepts is iterative, the codes are revisited and the categories modified during the analysis until finding the saturation point where limited rearrangement can be done and there are not new themes emerging from the data⁴³.

Notes on Critical Discourse Analysis

I also borrowed some elements from Critical Discourse Analysis (CDA). The main objective of CDA is showing how ideologies are expressed, shared and normalised through language. Ideology within the framework of CDA is understood as the assumptions that implicitly contribute to the creation or permanence of unequal relations of power. The critical use of this form of analysis relates to help people to realise power differences and in the best cases contribute to modify them (Fairclough, 1995, 2003). Critical Discourse Analysis allows description and understanding of the social structures hidden under each social role. This way of analysing discourse is based in the work of Michel Foucault, who considered discourse as a form of exercising power and creating disciplinary practices (see Foucault 1971).

⁴³ Lichtman describes six steps in the process:

1. Initial coding (summarising ideas present in the data);
2. Revisiting initial coding;
3. Developing an initial list of categories;
4. Modifying initial list based on additional rereading;
5. Revisiting your categories and subcategories and,
6. Moving from categories to concepts

Critical Discourse Analysis works on the basis of some assumptions about the social world. Firstly, CDA assumes that power is distributed unequally between the participants of a determined social situation. In the second place, and due to its linguistic origins, CDA understands that language is part of society, language produces social reality and society influences language in a dialectical relationship. Thirdly, discourse is defined as language in action where social contexts will determine the characteristics of discourse. According to Fairclough and Wodak (1997), critical discourse analysis is different to other types of discourse analysis because in this approach language (text and speech – and also not verbal language and images) is considered a social practice in which the relations between the discourse, the institutions and the social structures are dialectical: the discourse is influenced by situations, institutions and social structures and these instances are influenced by discourse.

In a similar line, Van Dijk emphasises the role of discourse as action, indicating that “discourse is a practical, social and cultural phenomenon” (Van Dijk, 1997: 2). Discourse occurs in social interaction and social action is part of social and cultural contexts. At the same time language users belong to social categories that influence the content and form of their discourse. Discourse has functions which are accomplished through social practices where local and global aspects of the social world are involved. For example, Van Dijk indicates that discourse of the justice system has as one of its functions imparting or “doing” justice (1997: 5). Imparting justice is not only to return a verdict; the process uses social practices, such as asking questions, making accusations and describing past actions (1997:6).

According to Van Dijk, there are four key concepts in discourse analysis:

- Action: defined as human actions which have a purpose and that become “socially real”, i.e., when actions have social consequences (Van Dijk, 1997: 8-9).
- Context: All the discourses are carried out in a social situation. Van Dijk defines context as “the structure of those properties of the social situation that are systematically (that is, not incidentally) *relevant* for discourse” (1997:11). There is a local or interactional context and a global or societal one. Characteristics of participants of social interaction are part of the context along with historical or political circumstances. Depending on the situation the relevant characteristic of participants could be age, class, ethnicity or profession among other roles or identities.
- Power: Defined as a relationship between social groups or institutions in which the powerful can make that the less powerful act in ways that agree with the powerful interests. Unequal relations of power put a limit in the freedom of people, groups or institutions with limited or not power (1997:17)
- Ideology: Described as the belief that certain social order is legitimate or inevitable. Ideology reproduces asymmetrical power relations among social groups. This is carried out “through the ways in which they [social groups] represent things and position people” (Fairclough 1997:258).

Critical Discourse Analysis works with language highlighting the importance of the use of language in the dynamics of power. How language is used not only shows power inequalities, but also contributes to them. Observing language in a given situation we can obtain a picture of the broader social circumstances. CDA defines language as a form of social practice, on this point Fairclough points out that "there is not an external relationship 'between' language and society, but an internal and dialectical relationship" and in this sense “linguistic phenomena are social phenomena of a special sort” (2001: 19).

The inclusion of CDA in this work has the aim of using some features of language analysis as signposts/markers that may lead to significant issues such as representations of crime, young offenders and citizens security. The idea is look for keys of world representations in the discourses. For example, the use of certain metaphors⁴⁴ such as comparing crime to a disease, using the metaphor “war” (on crime) versus “peace” or “putting a lock to the revolving door” of prison and using an “iron fist” for punishing offenders are used globally to describe the crime phenomenon, exaggeration and generalisation such as “all these kids are bad” or “we are not talking about little innocent children here”, emphasising negative characteristics of offenders and omitting circumstances of life and of the offences themselves. Another example is overwording and a form of finding meaning relations –in the form of synonymy, hyponymy or antonymy- which is considered a sign of ideological struggling in CDA. Another useful feature from CDA that I considered is the consideration of the level of formality of the situation analysed. For example, face-to-face interactions like court hearings are very formal and stereotyped which is reflected in the judicial files. The level of stereotyping of this form of interaction is so high that templates for police and witnesses statements are the norm in the Chilean case.

Other questions to ask from the texts if: Is agency unclear? Are sentences active or passive? Are sentences positive or negative? Is the speaker/writer using authenticity claims, for example, trying to establish categorical truths; and how are pronouns used? In Spanish pronouns are used as a form of marking formality when speaking. There are two forms of “you” (tú which is informal and usted that is formal, the formal way is used in every formal situations, at work and it is expected from young people and children when talking to adults), in court the formal way is expected from young defendants and in general is used also by judges to refer to them although in everyday life situations an adult will use the informal form of you to talk to younger people. Fairclough also refers to two ways of using “we”: “we” inclusive

⁴⁴ Fairclough defines metaphor as “a means of representing one aspect of experience in terms of another” (2001: 99)

versus “we” exclusive. These forms of using “we” are common in politicians discourses when trying to unify views about certain issues, when talking about crime, for instance, it is common to portray situations in terms of “they” (the criminals, the dangerous, the bad ones) against “us” (the law obeying people or the good ones).

Critical Discourse Analysis pays great attention to the assumptions that speakers and writers make about their audiences. This is relevant for this study as a big proportion of my data relates to statements made in an deliberative setting with clear aims in the case of Parliamentary debates and in a declarative/informative fashion in the case of annual Presidential accounts. In both situations language is used from a position of power and in a context of power struggle for imposing determined views and policies concerned to youth crime. In this context it is also crucial to notice what participants predominate or monopolise the talk.

The different documents present in judicial files are an expression of institutional encounters and respond to actions that occurred (what happened during the arrest, how the events are narrated by every person involved in the case) or are required to occur in the future (how the “social peace” will be recovered after an offence, for example). In other words, they are expressions of socially real actions. It is important to bear in mind that the format of the texts is highly standardised and in that sense the story that could be reproduced using them as source of information is not a complete representation of the events. This is in part because it lacks of the elements of the discourse that are present in face-to-face events and due to the purposes of producing these files.

I have to make clear that I did not analyse every piece of data at the detailed linguistic level that CDA requires, but having these ideas and elements in mind during the analysing the interviews, the judicial files and the Parliamentary debates helped me to find out some of the ideas or

explanations that senior officials have about how the youth justice system has changed and their perspective on youth crime. In the case of the data contained in the judicial files (described in the next section), which is highly structured according to the role of each actor in the justice system, the objectives of CDA help to make evident the settings and positions of actors in the system, showing for example, the lack of space for the defendants to offer their points of view (or the lack of willingness of recording what they say), giving a general picture of the system at work in two different periods of time. More importantly, this approach can help to characterise organisational features of pre and post reform periods and examining if the legal reasoning in young people's criminal trials has changed after legal modification. Thus, including this approach is a form of discovering normative issues in different actors' discourses. In a similar trend to what has occurred in the West, in Latin America and Chile we can observe conflicting values and aims mixed in the youth justice system. Rather than analysing discrete components of the youth justice system the goal is showing the hybrid rationalities and practices in use.

4.5 Judicial files analysis

This section describes how trials have been carried out in pre and post reform periods through the analysis of judicial cases of young people accused of committing criminal offences. Critical Discourse Analysis is used to call attention to the social relationships that the different actors of the criminal system represent.

One could argue that analysis of official documents only is not enough to explain how and why events happen, but it is a first approach to show the kind of decisions that are taken by the criminal courts in cases where young people are involved. It also gives an idea of the reasons why those decisions are taken. A study using systematic non-participant observation of trials would be very useful to unveil the circumstances in which the decisions are

taken. Therefore it would be possible to complete the picture that official reports give. A particularly important aim of such a study would be to establish if young people are actually able to put across their points of view in trials and if the trials are conducted respecting their rights.

Information in young people's judicial files pre and post youth justice reform

The information contained in young people's judicial files is structured according to the path that they follow in the justice system. Every institution in contact with the young person has to write a document describing the characteristics of their interventions. There are some differences between pre and post reform periods regarding to the content of each file. These differences are due to changes in the criminal procedure, which is currently adversarial and also is explained by the changes in youth justice law where some elements have been eliminated. The most important difference is the recent abolition of the "discernment process".

Thus, a pre-reform file is usually structured as follows:

The first document that we find is a police report in which the circumstances of the detention are described. It also contains a medical report of the detainees' health, and this tells us if they were injured during the arrest. In addition, the police checks if the detainees have another present or past lawsuit and indicate where they are held until the first court hearing. Besides, an "extra-judicial" statement of the victim is added.

After that report there is a first notification to the court where the detainees are called to attend. Following, the statements about the events that originated the arrest, the judge of the Criminal Court decides if the detainees are kept in custody or not.

When the age of young people charged with the offence is verified, the judge requires the minors' court to determine if the young person committed the offence being aware of the consequences of his or her acts (discernment).

In the minors' court the judge decides in which institution of the National Minors' Service the reports that the judge will use to take his or her decision about the discernment of the youth will be carried out. Then, the psycho-social report is added to the antecedents. In this report, demographic characteristics are mentioned along with a description of the young person's family, the young person's educational background, job experience, relationships with other young people and family. The personal appearance and attitude in the interview with social workers and psychologists is also mentioned in this report. At the end of the document, there are suggestions for the judge about the discernment and future measures that could be taken about young offenders' situation.

After the decision about discernment, a judicial measure against the young person is taken by the judge (Minors' Judge if the adolescent is considered without discernment or the Criminal Judge if the young person proceeded with discernment).

Finally, a report (or several depending on the circumstances) of the development of the measures determined by the judge is sent to the court by the institution in charge of applying those measures.

In the case of the files after youth justice reform the structure is rather similar. First, a summary of the case is found, here the type of offence is defined by the Public Prosecutor and the punishment or measure that he or she will try to obtain is established. Then a report made by the police about the arrest is found. This report is similar to the one used before the youth

justice reform, containing a medical report of injuries of victims and detainees and the first statements of police and victims about the offence. Files of the post-reform period do not contain a psychological or social report (because of the elimination of the “discernment process”) and the involvement of defence lawyers is seen from the beginning of the case in contrast to the pre-reform period where the defence was provided.

Analysing the judicial files one can notice that the statements of all the participants are greatly standardised both in pre and post reform periods. When a victim or a defendant is asked to give their version of the events, the language is transformed to the language used by the institution which is asking. For instance, if someone makes a statement to the police, the police record describes the events as if they were told by that person using “police language”, but few people would talk in that way in reality. The same thing happens in courts. This suggests that the system that is quite depersonalised.

In the pre-reform stage the outcomes in some way can be predicted without considering the events of the alleged offence at all. On the contrary, in the post reform period more weight tends to be given to the police and victims statements over other considerations. The decisions on sentencing are established in the Act limiting the discretion of the judges and therefore they can only decide on the length of time for the measures and, at some extent, for the plans of intervention proposed for the young person.

In a couple of cases, young people accused of committing an offence tell in their statements that they were assaulted by the police but no more information about that accusation is found in the rest of the file.

Chapter 5: Youth justice reform origins

As I have mentioned in earlier chapters, the changes made to Chilean youth justice were the result of a long and eventful process that lasted around two decades.

In this chapter an account of the process is given based on interviews with several key players. This chapter is divided into two parts. The first part describes ideas and developments about the policy making process in general and how these ideas can be used to analyse Chilean youth justice reform, while in the second part, findings from interviews with policy makers and relevant elements from the Parliamentary debate are used to show the dominant ideas and beliefs that were at the centre of the reform's origins.

5.1 What ideas contributed to the changes to the juvenile justice in Chile?

The guiding question of this chapter is, "What have been the intentions and ideas that have influenced the Chilean youth justice reform?" The objective of this question is to explore the originators of this reform in Chile.

It is very difficult, to not say impossible or dangerously inaccurate, to trace the origins of any policy to specific causes or precise times⁴⁵. Probably the best that can be done is to recognise the complexity of the process and to consider a large number of sources to use in the analysis in order to increase reliability, as each source is likely to have some kind of bias or limitation. In this case, interviews with key informants, the contents of Parliamentary debates (History of the Law 20084 and History of the Law 20191) and

⁴⁵ For practical reasons this account places the signature of the UNCRC in 1990 as the starting point of this reform.

President's Annual speeches, along with institutional reports are used to understand the origins and the development of this policy.

One way of tracing the ideas and standpoints of key actors about youth justice reform is to borrow elements from the Advocacy Coalition Framework (ACF) developed by Sabatier and Jenkins-Smith (1988). This tactic of policy analysis was first created in the 1980s and has been continuously revised and improved by Sabatier and other authors (Sabatier and Jenkins-Smith 1993, Sabatier 1998, Sabatier and Weible 2007). Their theory of policy process includes finding the way in which social problems are defined as political problems and are tackled by a policy action.

In their first version of ACF, Sabatier and Jenkins-Smith stated that policy change over time would depend on three processes. First, there are competing advocacy coalitions within policy subsystems. Every coalition is formed by actors from different institutions that share basic beliefs about how certain policies should be. They work towards policy goals and will use their resources and power to accomplish those goals. Second, there are a series of dynamic external processes that will impact on the work of advocacy coalitions. Changes in socio-economic conditions and changes to the distribution of political power due to political elections, are examples of elements that could facilitate or make it difficult to implement a particular policy for advocacy coalitions. Finally, the stable characteristics of society will also give a base of opportunities and constraints for policy change. All these factors will affect the behaviour or strategies of the advocacy coalitions.

The Advocacy Coalition Framework has some other premises. It is based in a system of beliefs that coalition members share in different levels of intensity. In the first place, coalitions share *deep core beliefs* that are "very general normative and ontological assumptions about human nature" (Sabatier and Weible, 2007: 194) including stances about basic values such as equality, liberty, the role of the state in economy or ideas about justice.

The authors point out, as an example of core beliefs in practice, that the traditional disagreement between the political right and left are based on different core beliefs. Core beliefs are acquired in childhood and remain stable in time. The authors recognise two major systems of normative reasoning embraced in core beliefs: a rule-based (always following the rules) form of reasoning and a consequence-based (maximising good consequences) approach.

The second level refers to *policy core beliefs*, which are basically the application of deep core beliefs to policy decisions⁴⁶. A key exercise when using this framework is identifying what are the policy core beliefs which will allow recognition of the advocacy coalitions related to the policies that are being analysed. Later in this chapter, I will carry out this exercise for the youth justice reform case.

The third level, named *core policy preferences*, refers to the beliefs that project an image of how the policy should be in real life. This corresponds to the vision of the actors used in a strategic form.

Finally, they mention *secondary beliefs* that are much narrower and that can be compromised if it is for the benefit of a superior belief. These beliefs come into play when specific issues of policy are negotiated.

The way in which social problems are understood differs depending on the values that are at stake and the justifications given at the moment solutions are chosen. Perception of the same information would be different for actors from competing coalitions. Sabatier and Weible point out that participants tend to value losses more than gains which results in feelings of distrust and in distorted thoughts or views about their opponents, and that causes a

⁴⁶ Although Sabatier and Weible point out that not always there is a “one-to-one” relation between deep core beliefs and policy core beliefs. For example, when a right wing politician that strongly support market solutions to social problems agree in giving compensations.

perception of the opponents as more powerful than they probably are. This situation has been called “the devil shift” (2007: 194).

Despite the strength of core beliefs and the permeability of values in every process of policy making, some possibility of change has been identified by Sabatier and other scholars using the Advocacy Coalition Approach. Sabatier and Weible (2007) provided a way of organising these situations and argue that there are two ways in which change is produced. On one hand, belief change can be achieved through policy-oriented learning or alterations of beliefs, thoughts or behavioural intentions based on new experiences or new information. On the other hand, changes can be triggered by external factors (socio-economic or political, among others). Despite this, changes are very unlikely at core belief level, but policy-oriented learning and changes in the context of the policy area (either in the dynamic or stable context) can alter secondary beliefs inside a coalition.

Which positions can be found when debating policy changes in the Chilean youth justice reform?

Using the framework described above, I was able to identify several beliefs that I gathered together in two advocates coalitions. Analysing their beliefs allows understanding of the beginnings and directions that the reform has followed until now. The questions guiding this part of the chapter are the following:

- What are the origins of the youth justice reform in Chile?
- Can we identify advocacy coalitions?
- Is there any person, group or idea dominating decision-making?
- What other actors have provide evidence that provided reasons to modify positions?

Answering these questions will help to identify a series of ideas, beliefs and actions related to the enactment of the law.

What are the origins of the youth justice reform in Chile?

Defining exactly what a policy is can be a difficult job. In general, a policy is an intention or an action, but frequently policies are a mix of intentions and actions. In order to analyse policy origins, Page (2006) uses four levels of abstract divisions of intentions and actions that would characterise any given policy. In the case of intentions, he establishes that at least two levels can be identified. Intentions may be quite broad if we are talking about principles guiding a particular policy or specific if we refer to certain objectives contained in a policy these specific intentions are called “policy lines” by Page (2006: 211). This form of distinguishing what are the origins of a policy has in common with Sabatier and Weible (2007) the idea that principles (similar to core beliefs for Sabatier) are linked to objectives (policy core beliefs) and that both kinds of intentions will shape the actual positions and decisions about a policy.

Page argues that a law usually has several “policy lines”, for example, if we take the Chilean Act on Adolescent’s Penal Responsibility, at least four possible policy lines can be identified:

- One line seeks to “educate” young people (on several fronts, from inculcating responsibility to complete formal education) and has as a result their social reintegration.
- At the same time, the Act puts as a priority the responsabilisation of young people for their offences. The aim is that they recognise their wrongdoing and learn about the extended damage of their behaviour on other people’s lives.

- Another line seeks the regulation of procedures and establishing how different actors of the justice system should behave when dealing with young people.
- The Act also looks for improvements in criminal rates and dealing with the perception of impunity and inefficiency of the system, issues which are constantly highlighted in the media and opinion polls.

For Page “actions” can also have two dimensions. One dimension is composed of the measures taken or concrete steps that will take policy intentions to realisation. The other level refers to the practices carried out by officials. Measures generate policies as well as modifying situations that can lead to new policies, in Wildavsky words they “tend to feed on each other” (quoted in Page, 2006: 212). It can be argued that to some extent most of the policies have their origins in other policies as they come to replace, rectify or deal with problems originated by these policies.

At this point it can be deduced that policy ideas behind policy lines could be either complementary, or like in the case of this study, rather contradictory (as in the case of educational, punitive and justice aims in the youth justice system). In several cases, ideas can be developed unintentionally as result of certain practices or bureaucratic habits as we also will see below.

Which advocacy coalitions can be identified?

The hypothesis guiding this section suggests that there are at least three identifiable coalitions of advocates organised around three core beliefs:

- The belief that legislation should follow closely the UNCRC;
- Belief in the quantitative and qualitative increase of youth crime that should be controlled in favour of improving citizens ‘security, and;

- The belief in the tutelary regime as the best way to approach youth crime.

There is a fourth group of actors in which none of these beliefs predominate so it cannot be defined as a coalition as they do not have a clear goal related to this policy. Once the groups are identified and defined I show what their role was in placing their beliefs on the political agenda and how they influenced the passage of the Act on Adolescents' Penal Responsibility.

Transversal contributions

Advocacy coalitions have had an important role collecting information about the situation of young people in the criminal system. This information has been valuable especially during the 1990s as Chile did not have reliable information systems related to justice administration. When information is produced systematically and is of high quality, it can help to boost the credibility of the coalitions, put their ideas forward and contribute to parliamentary debate (Fuentes, 2006). In the case of the Chilean youth justice reform both of the most dominant coalitions produced information that served all the purposes outlined above.

In general terms, it can be said that until 2002, children's rights ideas dominated the debate. The influence that each coalition has had changes through the evolution of the policy process. More actors became interested in the topic particularly at political level. As in other jurisdictions, in the Chilean case it can be observed that democratic Governments are under constant pressure from the electorate to reach a good balance between fostering their citizens' rights and maintaining or increasing public safety. Crime started to be seen as a political threat and as an opportunity to get political advantage, resulting in unclear boundaries between actual crime and politics (see Cohen, 1996).

Coalition 0: Tutelary regime as the best way to approach youth crime

According to Cillero and Bernales (2002) there was a group of actors that during the 1990s supported the continuity of the tutelary regime as the best form of dealing with youth crime. These authors claim that this group “pretended they supported simultaneously the Convention while they denied that a system that respected the guarantees of the due process was needed” (2002:29). They defended the idea that minors are not liable for their crimes. They viewed that offences were something “abnormal” (they were supporters of the “abnormal circumstances doctrine”) that did not need to be treated by the criminal justice system. This standpoint was held mainly by members of the judiciary that work with children and young people (minors’ judges).

Coalition 1: Children’s rights advocates/rights-based decisions

It can be argued that at least until the publication of the draft bill of 1998, the idea that dominated the discussion about reforming youth justice was the adaptation of local legislation to the UNCRC’s precepts. The 1998 draft bill was the result of the collaboration between the Ministry of Justice and UNICEF and involved the participation of several other actors, including members of the judiciary, senators and deputies, academics and lawyers (see UNICEF and Ministry of Justice, 1998). This collaboration included a series of meetings and workshops where policy ideas were shared and discussed between policy makers, experts, academics and practitioners. A number of people involved in this stage began to be interested in youth justice during Pinochet’s government. Some advocates interviewed for this thesis stated that they started working on this area after they witnessed living conditions of young people in adults’ prisons or while doing their work experience at late stages of their undergraduate studies, while others have been involved in a less systematic way. Despite the differences of origin and profession of these actors, some shared beliefs and ideas can be identified.

Common standpoints found in interviews and document analysis makes it possible to recognise the goals that this coalition pursues:

- Promoting children's rights;
- Changing the juridical status of children in Chilean legislation (from a powerless object of compassion to a subject with rights and obligations);
- Promoting guarantees of the due process for young offenders;
- Promoting the idea of “progressive citizenship”, i.e., giving children the right to increase their autonomy through making decisions about their life according to their age and development;
- To improve the legal and practical situation of adolescents involved in the criminal system.

The children's rights coalition is integrated by lawyers, members of organisations that work directly with young offenders and vulnerable children, members of human rights organisations, politicians from centre-left parties that agree with liberal values, some policy officers and academics. People closely affected by this reform (young offenders themselves and victims) do not have a voice or the power to make society to hear their points of view. As well as being vulnerable they are seen as “dangerous” and this means that a good number of citizens may consider that they do not deserve to put across their points of view. Children's rights advocates have made some attempts to bring the problems suffered by young offenders into the debate by spreading knowledge about the reality of young people's experiences in the tutelary and penal systems, but these works usually are not disseminated further than specialised environments⁴⁷. The general public is informed by the mass media that overemphasise violence and crime in their reports, which

⁴⁷ Unfortunately in Chile there are not studies like Hough and Roberts (2004) where people were informed about how the justice system really works for defendants and then their attitudes towards offenders were measured. This study shows that people tends to moderate their views if they know about the context in which a crime is committed and the consequences that offenders face.

increases population's fear, even when levels of recorded crime are relatively stable (Sunkel, 1992; Ramos and Guzman, 2000; Hoecker 2000). Sunkel (1992) traces this trend back to the early 1990s, following the overthrow of Pinochet's dictatorship, when the lack of a big cause to fight left an empty space in public discourse that was replaced by micro-conflicts of everyday life, among them, violence and crime. This situation was very noticeable and even led to debate in the Senate in the early 1990s. This debate resulted in a public call to "stop giving so much coverage to terrorist acts" (actions carried out by extreme left groups during the first years of return to democracy) and "not giving them the publicity that they seek" (quoted by Sunkel, 1992: 30, own translation into English). According to Sunkel the level of coverage of violent issues did not relate to an increase on crime. This author states that:

"publicising these themes through an image of citizen insecurity has a double effect. On the one hand, it creates a climate of alarm in the population, and on the other hand, introduces elements of distrust about the ability of public authorities to control public order" (Sunkel, 1992:31).

An important factor to consider when talking about the way that crime is portrayed in the media is related to the concentration of media ownership⁴⁸ and the editorial lines that mainly represent conservative views that have been in the political opposition to the Concertación, the centre-left coalition that ruled the country from 1990 until 2010 (see Hoecker, 2000 for an account of the major newspaper reports on crime). This tendency has

⁴⁸ According to Sunkel (2001) there are three aspects that show how economically concentrated the media are: ownership, participation in the market of publicity, and participation on the market of audiences. There are two economic groups dominating newspapers market: the Edwards group (publishing 17 newspapers) and COPESA group (controlling three national papers). Together the newspapers get 36% of advertisement while TV obtain 56% of resources from publicity (data from 1998 quoted by Sunkel 2001). There are five free-view channels: TVN (state owned but self-funded through publicity); Canal 13 (former Catholic University channel, owned by the University and the Luksic Group formed by the Luksic family); Chilevision (Time Warner); Megavisión (Bethia Group); La Red (Albavisión). The radio is the media with more diversity of owners, although there is recent tendency to concentration as well.

become a generalised trend in the media⁴⁹ as documented by Ramos and Guzmán (2000).

In this context, the children's rights coalition has had constant problems to make the public aware of their views and arguments. This lack of space for a rights perspective was also an issue during the 1980s, as one interviewee points out:

In the past, public debate was mainly about opposing something and later [when democracy was recovered] it was to build something. Of course during times of opposition these topics were not very relevant; that 100 adolescents were in prison was not a human's rights issue visible in any report. These situations did not emerge even in serious reports about human rights in Chile made by special rapporteurs. Everything was concentrated on political persecution. Anyway, the idea that children were also victims of human rights violations had to be built (Academics and experts 1).

Members of the children's rights coalition were aware of the fact that their goals were not on the public agenda. They were also conscious of the increasing perception of young offenders as agents of public concern and how they became the scapegoats that justified punitive ideas. Despite this, the members of this coalition insisted on the importance of improving the status of children and adolescents in relation to the state.

At least three actions carried out by this coalition can be considered important for the subsequent development of the youth justice reform. First, the promotion of children's rights ideas through workshops and seminars aimed at stakeholders and policy makers. Second, this coalition supported the enactment of the law that removed people under 18 years old from adults' prisons, a measure that was taken in 1994 as part of the plan of adapting legislation to the UNCRC. Third, they backed the agreement

⁴⁹ For example, in 2006 the time that TV news spent reporting crime was between 51% (Chilevisión, channel owned by President Sebastián Piñera between 2005 and 2010) and 23% (TVN, channel owned by the state managed independently and self-funded by publicity) of the time on violence and crime (Study commissioned by the newspaper La Nación published on June 2006)

between the National Minors' Service and a series of NGOs to provide defence lawyers for young offenders in 1995⁵⁰.

Most children's rights advocates came from the civil society and started to gain experience and being influential after a long time working on topics related to childhood and justice. For example, one important institution linked to the Catholic Church called "Hogar de Cristo" (Christ's Home) had started to offer legal services and psycho-social support to imprisoned adolescents since mid-1980s. They also provided alternative measures that were used to replace imprisonment in some cases. One interviewee talks about the novelty of their work in the 1980s:

When the sections for young offenders were part of the adults' prisons they could witness worrying levels of violence between and against adolescents and they helped to calm the environment through group therapy, but the most innovative and important contribution of this group [called CAME Centre for Minors Care] was providing legal advice to young offenders (Civil society 1)

A strong moral standpoint is another aspect that make possible to identify this coalition. The following quote summarises the core values of this children's rights advocates:

*The recognition of the human dignity of the child is what gives sense to a specialised penal system, not the fact that educating the child is better than plain punishment. It is not that one can calculate in a consequentialist way that if we treat them in this way, there would be less delinquency in the future. It is not the educative principle the one that differentiates the penal system. My thesis, which I think is strongly present in the UNCRC, it's that the **human dignity of the child requires a different relationship with penal law** and that is much more powerful than any other consequentialist matter of finality, positive special prevention, re-socialisation, etc. That was the traditional way: instead of punishing, educate, but well, if they are too bad just punish them (Academics and experts 1).*

⁵⁰ Although legally SENAME was not in charge of this issue they agreed to fund this initiative on the way to a youth justice reform.

Coalition 2. Citizens' security advocates.

In this section I argue that a group I have defined as the 'Citizens security advocates' have had a crucial role in ensuring political rhetoric has been dominated by punitive ideas as well as in guiding policies about crime control since the early 1990s in Chile. I will review the origins of this coalition back in the 1980s and 1990s showing how crime started to dominate the political discourse with the help of a group of citizens' security advocates.

Mass media, opinion polls, politics and the promotion of coalition's beliefs

During the military dictatorship the rhetoric about crime was centred on a particular type of enemy: political adversaries. Several times during the military government, political crimes were disguised as common crime or as confrontations between left wing groups but the emphasis was put on the existence of "Marxist terrorists" that constantly attempted to cause disturbances to Pinochet's government. Since the beginning of the democratic recovery, the place of this public enemy continued to be highlighted by the media as a way to show that the new government was not able to control the extreme left groups in operation during the early 1990s⁵¹. During the 1980s the military government used a set of ideas and practices stated in a plan called the "National Security Doctrine". Pion-Berlin (1989) defines National Security Doctrines as "a set of ideas and principles aiming to enhance national security" (412). This doctrine places security as the main policy that the state should deliver. The strategy used under the National Security Doctrine is one of creating the perception of a permanent war but

⁵¹ In fact, these groups carried out serious violent crimes, such as bank robberies, homicides and kidnapping. Some of the cases that caused more public alarm were: the assassination of the Senator Jaime Guzmán in April 1991, one of the leaders of the right wing party UDI (Democratic Independent Union) and ideologist of the Political Constitution of 1980 by the Manuel Rodríguez Patriotic Front (Frente Patriótico Manuel Rodríguez). In September of the same year this group kidnapped the son of the owner of the most influential newspaper, Cristián Edwards, who was kept captive until February 1992, being released after his family paid a million dollars. In 1993 the group Lautaro Juvenile Movement committed a bank robbery where eight people were killed (one security guard and one policeman were killed by the Lautaro Movement while the police killed three members of the group and three civilians).

"the subordination of strategy to tactics also reduces the language of politics to operative terms: counterinsurgency becomes counterforce and revolutionaries become terrorists" (Pion-Berlin, 1989: 419). In Chile, the military regime frequently referred to its opponents as "terrorists" and stated that their principal aim of the government was to eliminate the "Marxist cancer" that was attacking the country.

Authors such as Sunkel (1992) and Hoecker (2000) have pointed out that the power that the National Security Doctrine had in organising public life during the military regime was in some way replaced by the problem of citizen's insecurity since early 1990s.

The period of transition to democracy⁵² was uncertain due to the predominant place of the military in politics (with Pinochet staying as Chief of the Army first and as a Senator for life later) and the disagreement about the direction that the transition was taking according to some extreme left movements. Sunkel (1992) wonders about the role of the press in the transition: are they supporting or opposing democratic transition? Do the media help to ease uncertainty or to increase it? At the same time, how the political context impacts on the media? Sunkel proposes four hypotheses to answer these questions. First, he suggests that the media focused mainly on reproducing and amplifying the topics of interest of the political elites and did not pay much attention towards the topics that citizens could be interested in. This situation could be observed in both pro-government and opposition media. The topics of interest of Pinochet's opponents were: human rights

⁵² There is a permanent discussion about how democratic the country is after the military regime. The transition to democracy has been defined in different ways. One definition is limited to the period between the plebiscite of 1988 and the moment in which the first democratically elected president took power but some authors argue that Chile still lives under a partial democracy. Garretón (2010) for example, argues that the military regime left in place several obstacles to democracy results in an *incomplete democracy*. For this author the democratic transition effectively ended when Aylwin's government started but the democratic system was left incomplete in three dimensions: electorally, constitutionally and in what relates to citizens participation. Chile inherited its institutional framework from the dictatorial regime and democratic changes have been partial. For a start the country still is ruled under the Political Constitution of 1980 made by Pinochet (Garretón and Garretón, 2010).

violations, poverty and politics, as well as radical criticism to the military regime. The topics of interest in pro-dictatorship media concentrated on public order and economics in special “extremist violence”, attributing the violence to the supporters of “No” (to the continuity of the military government) option and showing the country as an economic leader in Latin America. They denied violations of human rights during the military regime (see Sunkel, 1992). After the presidential election of 1989 the prevailing topics in the media changed and became more homogenous. According to Sunkel, in the period leading up to the plebiscite, the agenda of the media coincided with the interests of the public, as people were highly interested in the political circumstances after 15 years of prohibition of political activities. This process of recovering “political citizenship” required information about which political options were available (Sunkel, 1992: 14).

After the plebiscite of 1988 and during the first democratic government, the agenda of the media changed towards a more homogenous setting, with opposition and pro-government media becoming less differentiated and the former opposition media in particular making an effort to introduce more “politically neutral” topics. The media covered the same topics from different stand points. The violation of human rights started to be recognised by the media who had previously supported Pinochet’s government, in part because of undeniable evidence and because of the establishment of a reconciliation committee that produced a document stating the scope of human rights abuses during the military regime. Although this section of the media recognised the facts, they tried to justify them saying that the situation was a consequence of a civil war where the security of the country was threatened. Sunkel argues that once democracy was recovered, the media tended to reflect the interests of the elite and moved away from topics closer to the interest of the public. Sunkel supports his argument using data from public opinion polls where people are asked what the most important problems of the country are. The results in 1991 showed that crime, health and unemployment were the topics that people were more concerned about, while the newspapers were talking about economic success, human rights

(the least important problems in the polls) and protesting as a public order problem (Sunkel 1992: 17).

An analysis of the role of El Mercurio, one of the most influential newspapers in Chile, helps to illustrate some of the points made by Sunkel. El Mercurio is part of a conglomerate of newspapers that produce a range of publications aimed at different audiences, promoting conservative views about society and it is very effective in doing so. It is known that this conglomerate supported the military regime, praising its actions and misinforming the public about events occurred during the 1970s and 1980s (see Agüero 2008, Dougnac, Lagos et al 2009, Ramos and Guzmán 2000).

Loreto Hoecker suggests that among the sectors which explicitly worked spreading fear of crime and the idea of the increasing presence of dangerous terrorists El Mercurio had a central role. Her analysis of the newspaper's editorials during 1992 showed that the topic of terrorism and common crime was mentioned frequently during that year. The messages were clear and directly blamed the new democratic government for the increase of crime and fear of crime, stating, for example, that: *"the authorities cannot explain the increase in crime that started, coincidentally, with the inauguration of the new government"*⁵³ (El Mercurio, August 16, 1992, quoted in Hoecker, 2000: 38). According to the author's analysis, El Mercurio based its criticism in two areas: on one hand it promoted the idea that the government had a wrong diagnosis of the problem as terrorism was considered something from the dictatorial past. On the other hand, the methods to solve the problem of terrorism and common crime were not efficient because the police were overwhelmed, the courts could not cope with the amount of defendants, and prisons were ineffective at rehabilitating offenders and preventing them from escaping (2000: 43). The suggestions to control crime expressed in the newspaper tended towards harder punishment or "giving criminals what they deserve" in order to deter them from committing crime. The paper also

insisted that the government should not show weakness when dealing with crime (as they did according to *El Mercurio*, using as example the decision to substitute imprisonment for expatriation for political prisoners). There was also a demand for a series of changes in the judicial system. Those demands for change did not relate to the introduction of elements of the due process but to the modernisation of the system in administrative terms and the privatisation of services.

An event that seems to be a landmark in the subsequent development of discourses and practices of crime control was the kidnapping of one of the sons of *El Mercurio*'s owner, Augustín Edwards, by the far-left urban guerrilla movement Frente Patriótico Manuel Rodríguez (Manuel Rodríguez Patriotic Front) in 1991⁵⁴. According to some authors (Agüero, 2008; Ramos and Guzmán 2000) this event influenced Edwards to take the decision of forming the think-tank Fundación Paz Ciudadana in 1992. This think tank has been very influential on Chilean criminal policy in recent years. The vision and mission of Fundación Paz Ciudadana states that they aim to contribute with scientific criminological knowledge to the debate on crime and to promote methods of crime prevention based in evidence. They have effectively contributed to improving the discussion on crime by producing studies and collecting and presenting data about the criminal justice system, as well as carrying out surveys that focus on public issues and crime. This think-tank has had an important role promoting ideas about crime and fear of crime, and their adverts aimed to show that criminals are everywhere and that individual responsibility for preventing crime should be encouraged. This kind of publicity was particularly strong during the 1990s. In order to publicise their work, the think tank launched a series of TV advertisements that were shown during prime time. Those adverts pictured scenes such as dark streets where a background voice (coming from a "criminal") praises the behaviour of people who may be a victim of crime (such as, walking alone in a dark street), with the advert finishing with the saying "we, wrongdoers,

⁵⁴ Edwards' son was kept by the Manuel Rodríguez Patriotic Front for almost five months (from September 1991 to February 1992). For a detailed account of Edwards kidnapping see <http://ciperchile.cl/2009/10/08/la-historia-secreta-del-secuestro-de-cristian-edwards/>

always need a little help”⁵⁵. Another important development of their publicity came towards the end of the 1990s with the acquisition of the rights to adapt a cartoon created by the American National Crime Prevention Council. This cartoon had the objective of increasing children’s awareness about how to avoid crime and consisted of a detective dog called Don Graf and his little nephew who together had different adventures defeating criminals and avoiding situations where they could be victims of crime. Don Graf was showed extensively in TV and a magazine was given away along with El Mercurio newspaper, also the character was taken to schools around the country to show how to prevent victimisation.

These examples demonstrate that gradually during the 1990s the image of the new internal enemy started to be shaped with the help of the mass media and the citizens’ security advocates. The new enemies were (and still are) criminals and “flaite”⁵⁶ whose behaviour threatens honest working people.

Another relevant tool used by this coalition is opinion polls. The information collected in the polls is constantly used as justification for carrying out measures that allegedly tackle the problems that people answering the polls consider to be the most worrying in a certain moment. However, there are arguments against this way of justifying decisions or solutions to control crime. First of all opinion polls are not a pure reflection of reality and, as well as official statistics, may contain several biases. One source of bias relates to the institutions that produce the surveys. In this sense opinion polls can be considered instruments of political action (or *artefacts* in Bourdieu’s words). Opinion polls tend to show problems faced by the public in a simplified way, omitting many of the tensions that the definition of a public problem can present. As Bourdieu puts it in his strong critique of this tool “The opinion poll is, at the present time, an instrument of political action; its most important

⁵⁵ These videos can be found in the website www.museopublicidad.cl

⁵⁶ “Flaite” is a slang word commonly used to refer to working-class uneducated young people that fits some stereotypes like listening to hip-hop, reggaeton or bailanta music and dress tracksuits (although it also can refer to working class attitudes or vulgar behaviour). To a good extent this is the Chilean equivalent to the term “chav” (for a discussion about “chavs” as a new social underclass and social phenomenon see Hayward and Yar 2006).

function is perhaps to impose the illusion that a public opinion exists, and that it is simply the sum of a number of individual opinions” and this would be done “in order to legitimate a policy, and strengthen the relations of force upon which it is based or make it possible.” (Bourdieu 1979: 125)

Throughout the 1990s, opinion polls showed that there was an increasing concern and insecurity in Chile. Public opinion surveys carried out by the think tank Centro de Estudios Públicos (Public Studies Centre, CEP), since 1990 have shown a high level of concern about crime, with between 30% and 60% of the people indicating that criminality is one of their biggest concerns. There have been periods when the concern has been particularly high, for instance in 1992 and 1993, the average percentage of people concerned about crime was around 60%, while when the Act on youth justice was sent to Parliament, in 2002, this figure was 43%.⁵⁷.

The idea of security, in the form of “human security”, was explored in a report on human development carried out by the United Nations Development Programme and published in 1998. It was argued at that time that despite having recovered democracy and the objective improvement of living conditions (falling poverty levels and the implementation of several social policies), the feeling of insecurity in the country was widespread and was not limited to fear of crime but also included social and economic aspects. The report found that the main cause for this situation was the gap between the country’s modernisation and people’s perceptions. Changes were happening fast and were not understood completely, which caused insecurity about the present and the future. The qualitative part of the study highlighted the frequent comparison between a past, when people could trust their neighbours, had time to share with friends and everybody was committed to their place of work or professions, and a present where there were high levels of distrust for other people and a feeling that you had to care for yourself. The researchers admit that the way in which people tended to talk

⁵⁷ Data available in the web page of the centre. Visit http://www.cepchile.cl/dms/lang_1/cat_443_pag_1.html

about the past appear to have been idealised and it is likely that things were not as good as they remembered (Human Development Report 1998: 211).

The Human Development Report of 1998 also included the analysis of a series of discussion groups about this topic. They noticed that the first association that participants made when talking about security is citizens' security. One explanation for this is provided in the report was that it is increasingly difficult to have an objective view of insecurity in the present day, because insecurity permeates so many aspects of people's lives. In this context criminals would be the scapegoat representing many fears (the report also identified economic insecurity and general uneasiness). They found that everyday insecurity and fear was strongly linked to crime (UNDP, 1998: 130).

Mistrust and insecurity seem to be linked according to the UNDP report. Dammert and Malone have argued, taking on Garland (1996), that "such insecurities are behind this increasing fear of crime because it allows the public to name the potential enemy: the fearsome stranger, the excluded" (Dammert and Malone, 2003: 80). In this context, young people from working class neighbourhoods and that fit with certain prejudices are the people most likely to be feared.

5.2 Debate of the law in the Parliament: between penal populism and tutelary beliefs.

The Parliamentary debate about the Act on Adolescents Penal Responsibility took about six years to complete. The final version of the Act contains a mix of elements that can be linked to different tendencies and that are reflected in the main objectives of this piece of legislation (see article 20 of the Act 20084):

- Establishing the penal responsibility of adolescents between 14 and

- 18 years old that are accused of committing an offence;
- Social reintegration by means of socio-educative interventions.

These objectives are designed to be accomplished in a framework of respect of children's rights and taking into consideration the superior interest of the adolescent even though details about what is meant by the superior interest of the adolescent are omitted from the Act.

These aims respond to three approaches to youth crime:

- Retributive justice, as the Act states that a proportionate form of punishment is the appropriate way of dealing with youth crime (although it is arguable how proportionate sanctions in the Act are);
- A positivist approach that assumes that lack of socialisation is a cause of offending and this can be solved through provision of effective education, and
- A justice approach, as the Act mentions that every form of contact of the adolescent with the youth justice system must consider his or her rights.

The next part of the chapter looks at the policy process describing its steps and the characteristics of the debate around the enactment of this law,

To start this section I briefly review the contents of the annual President's speeches given between 1998 and 2009⁵⁸. The emphasis is on references to youth crime and youth justice, the police, the Penal Procedure Reform, drugs and crime and the judiciary in general. The annual President's speech provides information about the political climate in the sense of showing what topics have political support that allows the government to put forward legislative change and new policies. The speeches are delivered in

⁵⁸ During the period analysed here Chile had the following presidents: Eduardo Frei (March 1994-March 2000); Ricardo Lagos (March 2000-March 2006); Michelle Bachelet (March 2006-March 2010); Sebastián Piñera (March 2010- present).

Parliament and are broadcasted on all the free view TV channels.

Among the remarkable policies and laws communicated in the President's account of 1998 is the announcement of the end of the ability to detain people regarded as "suspicious" by the police. This legal modification ended the police ability to stop, search and detain a person discretionally, something that was widely used against young people from marginalised areas.

In 1998's speech President Frei also commented about the wide support (across parties and civil society) gained for the future reform to the penal procedure. In relation to crime, the speech states that the roots of crime are very deep and start at home and when children abandon school. Despite this, the speech emphasises that social circumstances cannot be an excuse and people must be held responsible for their acts.

The following year President Frei insisted on highlighting the causes of crime. The reasons mentioned were: poverty, social exclusion, lack of opportunities for young people, leaving school at young age, use of drugs, and even the ever increasing individualism. This last cause of crime coincides with conclusions of the report by the UNDP about human security which relates insecurity with individualism and mistrust among people, published the previous year.

During this speech, youth justice reform is announced for first time although it is made clear that this draft would not be sent to Parliamentary debate until the reform to the criminal procedure was enacted.

In May 2000 President Lagos delivered his first speech. He highlights in his first account before Parliament that, following his electoral programme, he will be tough about punishing criminals, warning that: *"I am not prepared to*

allow that Chilean families feel threatened by a few elements that have taken the wrong path in society!”, just before announcing that the government would create a national security policy with the help of Fundación Paz Ciudadana.

This year the Reform of the Criminal Procedure was implemented and Lagos mentioned the advantages of this new form of justice administration in his speech, he emphasised the introduction of legal guarantees for victims and defendant and the reduction of procedures’ length. Also the punitive side of the procedure was highlighted when Lagos states that: *“we will achieve more efficient punishment for criminals, including life sentences that effectively are life sentences”*.

The second account given by Lagos also highlights the Reform to the Criminal Procedure, in particular how efficient and fast the procedure is now in comparison to the old system. Besides, citizens’ security is mentioned arguing that “the battle against crime” is “everybody’s task”.

In 2002 there are fewer mentions to crime and citizens’ security but for first time Lagos talks about young people and crime repeating that crime problems are “everybody’s task” and that includes young people.

Youth crime issues are not mentioned again until 2004 when Lagos urges the Parliament for an expeditious enactment of the Act on Adolescents Penal Responsibility (which was sent for Parliamentary debate in 2002).

In 2006, President Bachelet’s speech expresses her commitment to implementing the new Act on Adolescents Penal Responsibility during 2007 in the context of having delayed its implementation for a year due to lack of preparation for the correct functioning of the new requirements that the Act contains.

In 2007 Bachelet reaffirms that the Act on Adolescents Penal Responsibility will be implemented in June 2007 and warns that the changes will be substantial and a period of adaptation will be needed. She also recognises that the infrastructure for full implementation of the Act is not ready and the system will have to start using just what is available. Just a week after these announcements the possibility of postponing the implementation of the Act was discussed and caused a good deal of conflict between actors that were in favour and against a new delay⁵⁹. The Act was implemented, as planned, on June 8th, but last minute changes were introduced in a supplementary Act⁶⁰ that started to be discussed on at the beginning of May and was enacted by early June.

Finally in 2008, President Bachelet highlights how challenging the first year of implementation of the Act was because of its complexity. She restates that this Act finally brought impunity to an end but at the same time it aims for rehabilitate young offenders so crime can stop being a way of life for young people.

Presidents' speeches provide a general idea of the main topics related to justice and crime control that are considered significant enough by political actors to implement new laws and policies. In these speeches we can trace some of the mainstream assumptions about crime and justice and, to some extent, outline changes on the importance of some elements at different times. Consequently, topics identified here also appear in parliamentary debates and interviews with experts.

⁵⁹ Newspapers documented this last minute turmoil with headlines such as "Difficult last minute 'contractions'" (article reporting a strike of National Minors' Service workers and the lack of preparation to implement the Act, La Nación, 01/07/2007). While other paper published the article "Changes to youth law were promulgated with errors", referring to the difficulties that the publication of the Act could cause when in use while waiting for one of its articles to be approved by the Constitutional Court (El Mercurio, 03/07/2007).

⁶⁰ Act 20191 (Modifies the Act 20084 that establishes a system of criminal responsibility for their criminal offences).

Main topics in the Parliamentary debate of the Act on Adolescents Penal Responsibility

Four years after the first draft Bill was published by UNICEF and the Ministry of Justice⁶¹, the government presented its final draft Bill to the Chamber of Deputies on August 4th 2002. The debate on this proposal lasted for three years but the implementation of the Act was carried out only in 2007. That year, last minute changes were added to the final version (consisting mainly of increasing the maximum time adolescents could spend in custody). The following section will describe the most prominent issues found during the discussion of the law by the Parliament.

Objectives declared by the executive branch of government in the justification/presentation of the draft bill before the Parliament

The justification for the draft Bill of 2002 was presented to the Parliament as a presidential message⁶². In this message the government stated the aims and principles that guided the proposal. In this presidential speech, the message expressed that reform to the youth justice system in Chile was carried out within the framework of a *“complete reformulation of law and policies related to childhood and adolescence with the aim of adapting them to the new social and juridical requirements of the country and, in particular, to bring them into line with the principles of the Political Constitution of the Republic, the International Convention on the Rights of the Child and the other international agreements in force in Chile”* (Lagos in Biblioteca del Congreso Nacional, 2005: 5). As part of this intense period of legal reforms the message also stated that the Minors Act and the National Minors Service would experience future reforms during Ricardo Lagos government but finally those drafts were not presented before the Parliament for debate until 2012.

⁶¹ This first draft was finally not presented to the Parliament. A new version was created and presented for parliamentary debate in 2002.

⁶² The message is quoted in this section as: Lagos in Biblioteca del Congreso Nacional and the page numbers belong to the version of the message that appears in Historia de la ley 20084 published by the Biblioteca del Congreso Nacional (2005).

The main purpose of the proposal was *“to carry out a radical reform of the State’s responses to criminal behaviour when committed by persons between 14 and younger than 18 years old”*. The justifications for these drastic changes are based on the fact that the Minors Act of 1967 contradicts *“Constitutional requirements and the International Convention on the Rights of the Child, and in some cases these rules are clearly violated”* (Lagos in Biblioteca del Congreso Nacional, 2005: 6). At the same time the high level of “informality” or discretion that the tutelary system had was another reason that the government provided as justification for the contents of the draft Bill of 2002. There was not enough supervision over decisions made by minors’ judges which left young offenders at a disadvantage in comparison with adult offenders. Among the examples of violation of due process, the government’s justification of the draft Bill mentions the lack of access to a defence lawyer, having “procedures that do not resemble a trial”, sanctions lasting an indefinite time and basing decisions on elements such as being on “moral or material danger”. The proposal highlighted the paradox observed in a system that attempted to protect children but resulted in a detrimental position of young people before the law.

It is interesting to note that the message mentions, although vaguely, international developments in youth justice study, emphasising that systems mixing welfare and punitive perspectives fail to deliver their aims and highlights the need to make adolescents criminally responsible for their offences as the way to follow.

The justification of the law also introduces a competing aim: using the Act as a way to improve citizen security. This objective can be easily understood if we look at in the social and political context of the time. Since the 1990s there has been a recurrent discourse that has reinforced fear of crime (Ramos and Guzman, 2000) and the Minors Act from 1967 was considered ineffective at preventing crime. Despite a number of actions taken by the government during the 1990s, the public’s fear of crime, as well as crime

rates, were quite stable during that decade. Oviedo (2002) adds that the perception of insecurity is constantly reinforced by the media and politicians' discourse⁶³. In this context, the draft attempted to *"adapt legislation according to comparable legislation, being consistent, considering that adolescents are subjects of rights whose development and social inclusion should be protected and [at the same time] to achieve the objectives related to crime prevention"* (Lagos in Biblioteca del Congreso Nacional, 2005: 9).

The presentation of the draft also mentions the influence of foreign legislation when planning the Act (particularly from Spain, Costa Rica and Brazil) and the inclusion of the UNCRC and other treaties at the moment of developing its contents. There is also reference to the participation of national and international experts in meetings to think about the contents of the law as well as several pieces of research created from early 1990s. The information I have collected does not have the relevant detail to be able to answer questions of who is involved and what is specifically being transferred, asked by Newburn and Starks (2004). However, there is certainty that there are at least two groups that brought evidence from international settings: UNICEF experts and the think tank, Fundación Paz Ciudadana.⁶⁴ Several researchers working in Paz Ciudadana have studied abroad and are in fact participating of the process in which "a cosmopolitan elite transform its symbolic capital" and introduce it into local settings (Nelken, 2001: 356 commenting on Dezalay and Garth 2001). Paz Ciudadana has contributed to several studies comparing international experiences not only on the topic of youth crime, but also on drugs and crime, prison studies, the police, and crime control in general. Although it can be said that legal adaptation was propelled by UNICEF and the ratification of the UNCRC by Chile in 1990, the effects of this approach, which was children's rights centred, were

⁶³ For example, in 1996 TV news in three major channels (Teletrece, 24 Horas and Meganoticias) showed 132 hours of news about crime, being the second most covered topic only after "miscellaneous and sports" with 236 hours (Ramos and Guzmán, 2000).

⁶⁴ In its mission establishes that they aim at "contributing knowledge for the design and evaluation of public policy related to citizen security" (see <http://www.pazciudadana.cl/quienes-somos/mision/>).

“moderated” by local politics. About the role of UNICEF in the Chilean youth justice reform one of experts interviewed for this thesis comments:

It could be demonstrated that the Convention, the children’s rights approach, also was a robust instrument with potential to modify legislation, to construct something new. There was a change in the social and juridical perception about childhood (...). A more technical role had to do with direct participation through an alliance with the Ministry of Justice and the contribution of national and international professional, organising seminars, resources. Even in some topics, studies were commissioned by UNICEF in order to have information to support the proposals. But if you ask me what was UNICEF’s fundamental contribution I would say: the change of perception about children, children have rights; therefore the criminal justice system has to change accordingly (...) [By the end of the debate about the Act] UNICEF takes a different position and officially take distance from the government’s proposal assuming the role that is proper of an organisation which works more as a cooperation institution and has a role of surveillance (Academics and experts 1).

This is a good example of the transformation of legal transfer from their emergence to the actual legal modifications and beyond. In this case it seems that relevant formal changes were achieved but the results, if defined according experiences of young people in the criminal justice system, have been modest (see Muñoz 2008 about experiences of young people and next chapter for an analysis of reform changes). In the case of youth justice reform in Chile, the group identified here as “children’s rights advocates” illustrates the phenomena observed by Dezalay and Garth (2001) where “cause lawyers” may be heavily involved in testing the limits and applicability of new statutes passed under international pressure to protect the rights of racial and ethnic minorities, workers and consumers, or the environment. Their effort may be to use foreign borrowed law to serve the interests of non-elite groups’ (comment about Dezalay and Garth work by Nelken 2001: 364).

The arguments presented as justification for the need to reform the youth justice system were shared by the majority of the actors of the system. However, the possible solutions to the issue of youth crime were from the beginning contradictory and caused much debate. On this issue, one of the key actors interviewed points out that there were a series of problems that

were easy to predict which were caused by contradictions in the objectives of the law:

On one side there is an interpretation of the text by the executive power -by the minister Gómez⁶⁵- that is not so worrying but that can distort the original version. If you read the introduction of the Act you can identify two or three discourses and there is some ambiguity there. The message aimed to be coherent, I know that because I participated in writing the introduction of this Act and I know which changes they made and how they added them, so there were some things that they were defining. For instance, the maximum time of punishment went up from three to five years [referring to changes made in the time between the draft was prepared and presented to the Parliament]. Afterwards in the Parliament there were serious interventions of a different type. There is a second dimension which is very complex and that occurred from the approval of the Act until its implementation. When the Act was enacted, a period of six months was allowed for preparing implementation and that was absolutely insufficient (Academics and experts 1).

Other objectives stated in the draft Bill and included in the final version of the Act later on were:

- To define the age limits for criminal liability, which it is now between 14 and 18 years old.
- To verify that the behaviour investigated is actually an offence. This meant that punishment would be related to offences and not because of unspecific behaviour or life conditions.
- To establish guarantees of the due process for young people.
- To provide options to agree restorative measures (this is tangentially mentioned in the Act).
- To consider the rights and interests of victims under the limits of the “superior interest” of the adolescents.

One of the aspects that changed considerably during Parliamentary debate was the definition of what constitutes an offence. The draft Bill excluded most of the minor offences from criminal liability and only serious offences could be punished using detention as sanction (this was guided by the minimum intervention principle). The draft Bill defined a set of offences that would be

⁶⁵ Member of the Radical Party and Minister of Justice 1999-2003.

considered serious even if they were frustrated⁶⁶: murder, rape, kidnapping, mutilation and causing other serious injuries, and using violence in a robbery. It also determined which offences would be considered serious only when perpetrated, these were armed robbery and robbery in inhabited places. During Parliamentary debate there was vast disagreement about what would constitute an offence under the new youth justice system. In the end the enacted version punishable offences were simply the ones from the adult's Penal Code.

About the purpose of the sanctions UNICEF argued during parliamentary debate that:

Sanctions must be proportional to how serious the crime is, they should not de-socialise young offenders and should be oriented towards rights protection considering custodial measures only exceptionally. (...). The catalogue of sanctions shows that custody will not be used exceptionally. Use of custody would be for offences ranging from robbery to homicide with rape (Biblioteca del Congreso Nacional, 2005: 60).

Meanwhile, politicians were divided. One sector favoured the creation of a list of offences that would be considered punishable under the Act, which was in line with the original idea presented by the government and closer to the UNCRC. They campaigned for the Act to contain a clear separation of punishment methods between adults and adolescents, therefore the idea of linking sentencing to the adults' Penal Code was opposed by children's rights advocates as this would mean offering similar treatment to adults and adolescents. At the end of the debate it was decided that the Act would include the same offences that are present in the adults' Penal Code and that the length of the sentences would be lowered by one degree for adolescents. The actual content of the measures is different from adults' sanctions as well as the detention places which under the Act are only for 14 to 18 years old. This situation was criticised by children's rights advocates who considered that the spirit of the law was closer to decriminalising adolescents and providing a law and a system specialised in youth justice.

⁶⁶ By frustrated I mean that a crime has been interrupted by the police or others and so could not be completed.

This point of view can be observed in the following quote by a deputy during the parliamentary debate:

The changes that Senator Larraín and other senators want to introduce cannot be accepted because they go against the spirit of the law, and the government understood it in that way. The draft Bill was very clear establishing a reform that respected fundamental rights in the Act. In practice the judges must have the possibility of choosing between sentences according to the circumstances of the adolescent. Here they are saying that in case of serious sanctions this should not happen. However, serious cases won't be the only ones obtaining highly punitive sentences. If there are aggravating circumstances, for example an offence committed by a group of adolescents, they can be given sentences of more than five years and this can happen in cases of not serious offences (Deputy Socialist Party, Biblioteca del Congreso Nacional, 2007: 122)

Another sector of politicians insisted that it was not necessary to create an alternative list of offences for adolescents and that the difference would be in the different degrees of responsibility for adults and adolescents (see Biblioteca del Congreso Nacional, 2005: 67 onwards). An example of this is the way in which one senator tries to convince other members that the Act will not be punitive as some people argue:

I will attempt explaining how sentencing would work in order to demonstrate that the information provided by the media when publishing opinions of people external to the debate (...). You would realise that [with this Act] the minor would be subjected to a wide safety net provided by the state in areas like education, social reintegration and prevention of drug and alcohol use. Never before in Chile has there been such a high level of support for minors (...). Every minor is going to be sentenced one degree lower than the minimum sentence established for adults. Also, they never could be sanctioned with a sentence higher than an adult would get. I want to give you a concrete example thus you can see what this mean: if someone under 18 years old commits theft in the range of 31 to 124 thousand⁶⁷ pesos, this corresponds to a sentence of between 41 to 60 days, while for an adult the same offence has a sentence of between 61 to 540 days (...) Don't tell me that these sentences are too high! (Biblioteca del Congreso Nacional, 2005: 964-965).

During the discussion of the Act there were several occasions when

⁶⁷ Roughly about £30 to £100 at the time of writing.

parliamentarians distrusted the level of discretion given to judges in the draft Bill. There could be two reasons for that rejection. On the one hand, there was broad consensus that there had been negative outcomes from judges' discretion in the past (when taking into account the inquisitorial system and the Minors Act). On the other hand the increasing concern about citizens' security can be linked to parliamentarians being concerned about giving "a wrong signal to criminals" and therefore several of them tried to make sure that certain offences would result in minimum sanctions and a longer maximum length of time serving the sentence⁶⁸. Also in the line of limiting judges' discretion to dictate sentences, the Senate added a table in the body of the Act in which the possible sanctions and their extensions are set. A deputy commented on these elements:

Mandatory minimums of one or two years for young people between 14 and 16 years old and of two years for adolescents between 16 and 18 are not comprehensible. Why should we establish mandatory minimums? Why don't we give the judge the possibility of applying a sentence lasting, let's say, six months? Chilean prisons are at full capacity, 70% of prisoners are between 18 and 35 years old while 88% haven't finished primary or secondary school and half of the use drugs daily. I would like to end the stigmatisation of youth. (Deputy Party for Democracy, Biblioteca del Congreso Nacional, 2005: 246)

Another deputy adds that:

As it has been understood that measures involving partial custody present difficulties, the judge is now obliged, like he was a robot, to use custody as sanction even for offences that are not necessarily serious. I calculate that for cases of repeated theft or robbery adolescents could end serving ten years sentences. That is juridical brutality. (Biblioteca del Congreso Nacional, 2007: 100).

⁶⁸ Article 32 of the Act states that "the sanctions of deprivation of liberty that are applied under the modalities established in the articles 30 and 31, will have a minimum term of one year for offences committed by adolescents aged between 14 and 16 years old, and a minimum term of two years for adolescents between 16 and 18 years old".

Contributions made by the committee of experts formed by legal decree

In October 2006, the Act's implementation was delayed for one year due to the lack of preparation of detention centres. A committee of experts was formed by Parliament decree in June 2006 when it was decided to postpone the implementation of the Act. This committee was integrated by fifteen professionals⁶⁹ with experience in the youth justice field. The aims of the committee were to inform the Parliament about the progress on tasks related to implementation and recommend solutions to the problems detected. The committee published a report identifying the main problems that needed to be tackled for a successful execution of the changes in the law (see Comité de Expertos Responsabilidad Penal Adolescente, 2006). This report focused on five aspects considered critical by the experts, these problems were:

1. *Legal obstacles and other problems related to legal and institutional design.* They claimed that there was not enough clarity about the way of classifying the offences and how the time serving an offence would be calculated.

As the Act was created as supplementary to the Adults Penal Code, any changes to this code would affect the Act. This situation brings uncertainty when planning the implementation.

2. The need to clarify workload and “flows” of the system. There was not reliable information that allowed calculation of what the workload in the system would be. There was a discrepancy between the predictions of different institutions and the most recent studies, that were not up to date.

⁶⁹ The list of professionals invited to participate in the committee included representatives from: UNICEF, universities, directors of civil society organisations that work with young offenders, the Public Prosecutor Office and defence lawyers, think-tanks including Fundación Paz Ciudadana, Fundación Jaime Guzmán and Instituto Libertad, and civil servants representing the National Minors Service (SENAME), the Ministry of Justice and the National Council for control of narcotics (CONACE).

3. Programmes available. The committee highlighted that the contents of the sanctions were not well developed. The quality of the social reintegration programmes would be a key factor if the objectives of the law would be met. They also found problems relating to the real capacity of delivering formal education (as this should not be interrupted because of serving a sentence in detention centres). Additionally, they detected several infrastructure problems that would make it difficult to deliver the programmes properly.
4. Specialisation of the system and training for actors from relevant institutions. Despite the fact that all the institutions involved had put in place some form of training for their members, the Committee could not verify how effective this training had been. The characteristics of the courses varied in the time devoted to training, contents, the way in which learning was evaluated, the emphasis in practice or theory and quantity of attendants. What they could appreciate was that great importance was given to legal aspects at the expense of covering topics relating to adolescents' characteristics, which went against the requirements of the law⁷⁰.
5. Institutional strengthening, monitoring of processes and coordination of institutions. The experts suggested that it would be necessary to create a permanent structure in charge of the implementation of the Act and in charge of monitoring its results as well as instances of institutional coordination (for example, magistrates should be aware and have updated information about the available alternatives in their jurisdictions).

The committee found a core problem: there was a considerable gap between

⁷⁰ The Act establishes that "[officers] should be qualified on studies and criminologic information related to these offences, on the [contents of] the UN Convention on the Rights of the Child, on the characteristics and specific features of adolescence and about the system of execution of sanctions established in this Act" (Article 29, Act 20084, 2005)

the objectives of the law (prevention and guarantees of rights and the due process) and the means available to achieve the objectives. According to this group of experts, the system lacked human resources, infrastructure and technical knowledge to carry out the aims of the Act. The committee attempted an explanation for this situation, finding legal design problems as well as a problem of perception and expectations of “some actors” that viewed the reform as a simple form of attenuation of adults’ penal rules applied to adolescents while others perceived the reform as an extended version of what was done under the Minors Act (see *Primer Informe Expertos Responsabilidad Penal Adolescente*, 2006: 8). This fundamental contradiction has characterised both the discussion and the implementation process until now.

A second report was published in April 2007 (*Segundo Informe Comité de Expertos Responsabilidad Penal Juvenil*, 2007), just two months before the planned date of implementation. In their second report, the committee expressed concern about the responses to possible breaches of the duration of a sentence and the fact that minor offences could result in long term sentences. They considered that article 21 (about how to determine the nature and extent of sanctions) can be interpreted in different ways which could result in differences at the moment of deciding the seriousness of the offences and therefore their consequences could vary greatly. Some questions arose about the quality and availability of information that the judges will have to take their decisions: would technical information be allowed? Who will produce such information?

The committee communicated their worry about the living conditions of the adolescents in the centres destined to confinement in their first report. Despite information given by the Ministry of Justice about certain advances aimed at improving the living conditions in detention centres, the experts agreed a new series of visits to centres to check on the state of the changes.

The main conclusion expressed in the second report was of considerable impact as they suggested that the system was not ready to function properly, in their words:

“This committee, based on the antecedents taken into account, declares that today the minimum conditions necessary do not exist considering the contents of the legal text, and is not possible to guarantee that the infrastructure, the state of the programmes and the general administration of the system will allow an acceptable implementation of the adolescents’ penal justice next June”.

(Second report of the Committee of Experts, April, 2007:21)

The committee proposed carrying out the implementation gradually by age range, starting with 16 and 17 year olds and leaving the implementation for the range 14 to 15 year olds on hold until the problems with the Act and its implementation were resolved.

In May 2007 the government sent to Parliament a series of modifications to the Act on Adolescents’ Penal Responsibility (which had been enacted on November 11th 2005). These changes were enacted as a complementary Act (Act 20191 Modifies the Act on Adolescents’ Penal Responsibility).

During debates held in Parliament in 2007, the arguments put forward by the Committee were used by a group of politicians who tried to postpone once again the implementation of the Act without success (see Biblioteca del Congreso Nacional, 2007).

Coalitions of advocates: standing points during the debate of the Act

In the previous section I covered some of the factual elements related to the enactment of the law, in the following section I will explore the most significant beliefs about the nature and extent of youth crime. This section will tackle the question of the way in which political elites express their preferences and values about youth crime. The formation of coalitions of advocates, covered in a previous section, is very important when exploring this issue. This section looks mainly at the “political elite” using Putnam’s definition of political elite who states that they are “those who in any society ranked toward the top of (presumably closely intercorrelated) dimensions of interest, involvement, and influence in politics” (1971: 651). In his work Putnam also portrays a way of identifying how “ideological” political actors are (understanding ideology as a set of characteristics displayed by political actors). To identify their “ideology” or defining if they are acting “ideologically” Putnam (1971) uses an operational approach in which he asks if the actor is guided by elements such as:

- a comprehensive and consistent belief system,
- if this belief system is resistant to new information,
- if it is emotionally charged, which distorts reality,
- hostile towards opponents and paranoid,
- does not like to reach agreements that compromise their views,
- it is extremist or authoritarian.

All these elements can be identified when analysing how politicians work and how they refer to problems and justify certain solutions.

Citizens’ security advocates on the nature of youth crime

The topics covered below show the views expressed by members of the citizens’ security advocates coalition described earlier in this chapter. Their views correspond in general terms to a law and order discourse in politics. Under this discourse importance is given to:

- 1) The incidence, severity and risk of criminal victimisation;
- 2) The public perception of the seriousness of the crime problem and,
- 3) The rhetorical manipulation of the crime problem and public anxiety in media and political discourse (categories by Cohen, 1996:8).

While the draft Bill of 2002 contained several elements that corresponded to the views maintained by children's rights advocates (such as compulsory specialisation of actors and limits on the use of custodial sentences), during parliamentary debate those elements were replaced by more punitive elements put forward by the citizens' security coalition of advocates. In this subsection some of the most noticeable beliefs of the later are shown "in use". The quotes selected illustrate clearly the standpoint of the speaker. The quotes are taken from the publication of Parliamentary discussions issued by the Biblioteca del Congreso Nacional in 2005 and 2007.

One of the main characteristics of the citizens' security advocates coalition is their inclination to favour policies that put security before rights. The advocates of this coalition come from different political parties and institutions, therefore is not possible to identify their beliefs with a particular group. We will see that crime and order discourse was used by political actors from across the political spectrum. Political parties failed to present shared ideas about changing the system, and therefore it is not possible to identify any correspondence between parties and beliefs. Instead, party members tended to express their views from an independent base.

During the parliamentary debate, political actors used several justifications and explanations about the reasons why young people commit crime. In the next section, the main arguments used by this coalition are shown. The section is organised around two main topics: beliefs or explanations about the origin of youth crime and preferred solutions to deal with this problem.

The idea that families are in crisis and are not providing the necessary care for children and adolescents appears frequently in political discourse. President Frei (Christian Democrat Party) in his speeches to the Parliament insisted that families are the foundation of society and that the country “needs to strengthen the family” in order to create a good environment for the development of young people (Presidential speech 1998). He also mentioned that after talking to troubled young people it was clear that almost all of them come from broken families and no amount of money spent on police, drug rehabilitation or other related measures will solve the problem if we do not tackle the real problem: “the deterioration of family life” (Presidential speech 1999).

Claims about youth being out of control and the attempts to give responsibility to parents about their behaviour are not something new. The state has seen families as allies or enemies depending on how they help with the state’s social control needs⁷¹. In Chile, the father of the family has had considerable power over his children in the law. Couso (2003) analyses the extent of domestic penal power over children. This author highlights that under civil law, fathers were able to request imprisonment for their children if they considered it necessary, this power was used when children and young people disobeyed their parents and they were “out of control”. This happened until 1928 when minors’ courts were created. Although the power of putting children in prison at their fathers request was abrogated, they kept their right to “correct them and punish them moderately”⁷². Fathers that could not

⁷¹ See for example Donzelot (1979) about the evolution of family regulation in France since the pre-revolution times. Donzelot proposed the idea that fathers maintained family discipline (which reflected on disciplined local communities) in order to avoid intervention of central authorities in their areas. This also can be seen as fathers’ obligation for guarantee adherence to public order by members of their families, which gave them considerable power not only over children and young people but also over women and the mentally ill under their roof.

⁷² Couso 2003 notes that requesting imprisonment for children was not commonly used by wealthy families because of the social stigma that imprisonment would bring to the family. They used alternative options like sending their children to study in a different city or in extreme cases, locking them in a psychiatric hospital (p10-11).

control their children or were unable to provide economic support, resorted to minors' judges who could decide about "minors' future life" (including the possibility of institutionalisation). This happened until recent times as minors' courts were replaced by family courts only in 2005⁷³.

About the topic of family and the law, Sclater and Piper (2000) argue that in the UK the Family Law Act 1996 and the Crime and Disorder Act 1998 have been informed by the rhetoric of "family crisis". These authors state that as the liberal state depends on internalisation of rules it is easy for the state to link family instability and crime (138).

The explanations about the role of the family in creating or controlling criminality coincide with the opinions that the Chilean policy elite expressed during parliamentary debate. From psychology, for example, the role of mothers in nurturing empathy has been emphasised giving a signal to working mothers to return home. Also conceptions of what is a good family (basically married couples holding jobs) are used "as the guarantor of social stability, cohesion and prosperity" (Sclater and Piper, 2000: 140). But modern life does not provide the conditions for families to fit with the traditional roles and attributed responsibilities, which means that a significant number of families tend to be classified as dysfunctional. In the case of Chile, Güell (1999) draws our attention to the fact that, when dealing with modern problems families "don't know what to do". In a context of increasing insecurity (including work, education, citizens' security, the pensions system, health and environment) families have to handle new problems without adequate access to resources. Nowadays families have to organise themselves to live with, for example, structural job insecurity or the

⁷³ About the use of these powers over children a former minors' judge interviewed for this work comments that:

"The judge had the authority of taking children away from their homes and put them in care. People had lots of confidence in the judge. I remember a family, a couple with seven children telling me "we can't support them so I came to give them to you" and I, I was representing the state... and mothers, or mums and dads used to come together to say that they could not having them, they didn't have a job, didn't have anything so they came to give their children away to me saying "you do whatever you can because I can't do anything else" and there I was representing the power of the state" (Judiciary and institutions of justice 4).

increasing number of working women, situations that challenge the traditional structure of roles inside the family. Changes like these question the traditional codes of normality in the family. If we add problems like drugs or alcohol addiction of a family member we are very close to the definition of total crisis that some sectors of the political elite mention in their discourse. In other words, it is in the family where social insecurity is suffered and families are capable (or not) of creating strategies to face those insecurities (Güell, 1999: 2).

Families are also made responsible to prevent offending as they are the place in which children acquire discipline and moral codes. In this sense, Sclater and Piper highlight that “good parents are those who teach their children to act responsibly and to accept responsibility” (2000: 149). These authors suggest, coinciding with Güell’s observations of the state of the family in Chile, that “re-moralisation projects may also have discriminatory effects unless there is a real attempt to address economic, social, educational and geographical inequalities, as well as issues of gender and race.” (2000:151).

Looking at the citizens’ security advocates coalition we find views like the one held by two deputies from the Democratic Independent Party who presented a suggestion for changing the Act where they argued that: *“the circumstances in which minors are, have demonstrated that parents are not interested in them”*. A deputy from the Christian Democracy party holds views that coincides with those of the citizens’ security advocates, pointing out that it is common that the parents are not interested in what happens to their children, also claiming that deviant behaviour of children is generally the product of parental irresponsibility. (Biblioteca del Congreso Nacional, 2005: 105).

But family failure on taking responsibility for their children’s behaviour would have deeper roots, as another member of the Chamber of Deputies argues:

I consider it's essential to reinforce everything related to the family. I believe that, in a great deal, we are reaping the frivolous way in which family is considered in Chile: devaluation of marriage and the family is seen like the path to human perfection. Young people are told that it doesn't matter how they live their sexuality. They are encouraged to use sex almost like animals and even to be careful in order to avoid the main purpose of sex, which is procreation. It is essential to educate young people about values.

(Deputy, Independent Democrat Union party, Biblioteca del Congreso Nacional, 2005: 256).

This generalised moral decline identified by the deputy in the previous quote would not be the only problem that families had to deal with as I have previously explained. This is recognised by a member of the Senate:

There are additional elements, such as drugs and other situations. All the time we have been talking about lack of education, mistreatment and poverty. In summary, about how society values a series of things. If a person is educated to have and not to be and then that person is put into situations where everything is competition but she can't compete then that is when violence appears (Senator Christian Democrat Party, Biblioteca del Congreso Nacional, 2005 510).

Coalition's solutions and proposals to deal with youth crime

For this coalition punitive measures are in general considered the best way to solve the youth crime problem. This standpoint coincides with what Muncie defines as "resurgent authoritarianism" (Muncie, 2008). For Muncie, youth justice systems are designed in a contradictory and ambiguous way, and currently the way to resolve the problems caused by the confusion of objectives would be to resort to punitive and correctional measures. We will see examples of this phenomenon in the following examples of political elite views on ways of dealing with youth crime.

In first place, punishment is seen as an antidote to a climate of perceived impunity. One deputy from the Party for Democracy pointed out during the Parliamentary debate that: *"The Chilean law nowadays is a factory of*

juvenile delinquents and this draft Bill would end this situation. Currently, if a youth who is younger than 16 years old commits an offence he is left completely free. He is arrested but if the judge considers that he is not in good conditions to be accused of committing offences he cannot be punished”.

(Biblioteca del Congreso Nacional: 2005).

In this example, we can observe a politician being ideological, according to the definition of Putman described above. The discourse used by this politician employs contains exaggeration and does not correspond to reality when he states that *“Chilean law is a factory of youth criminals”* and that young offenders are *“left completely free”* when in fact one of the reasons for changing the system is that offences committed by adolescents were not investigated and the protection path that was used for the majority of cases included indefinite detention in centres that resembled youth prisons.

This punitive approach is commonly illustrated and justified using metaphors such as the need for using an “iron fist” that will not tremble at the moment of punishing offenders:

“If someone thought that when a youth committed a crime we only had to show understanding, this draft Bill establishes that we should show not only understanding but we should also sanction wrong behaviour. Iron fist along with fair fist (...) in cases of extreme violence even if we are talking about a minor between 14 and 18 years old, he will be sanctioned with prison” (Deputy from the Party for Democracy, Biblioteca del Congreso Nacional, 2005)

Punitive views are in many occasions justified using extreme examples such as the dramatic case used by a deputy from the Party for Democracy (PPD):

“However, I would like to say that I am in favour of this law, because we should not keep giving a signal of impunity, as occurred in the case of a 14 years old from the Población Palomar in Copiapó who raped a four years old child and then the judge decided that he was not able to discern between right and wrong, leaving this kid free. Now the four year old child doesn’t dare to go beyond his doorstep because his attacker is in liberty. This sends

two negative signals: it insinuates to the adolescent that what he did is not so serious and that is why he is not in prison, while the attacked minor and his family are left with a feeling of impunity". (Biblioteca del Congreso Nacional, 2005: 283).

In a fairly extreme standpoint advocates argue that the due process and Children's Rights are obstacles to justice, like this Senator from the Democratic Union Party who during Parliamentary debate emphasised that:

"There are two rules that we consider extremely delicate: one of them allows that the authors of atrocious crimes or reoffenders that commit serious crimes do not spend two years in detention and allows the sanction of assisted liberty. Because of this the public will understand that the new Act on Adolescents Penal Responsibility is again excessively careful about guarantees of young people". (Biblioteca del Congreso Nacional, 2007:251)

He goes even further, criticising one of the most significant policies of the last decades:

I would like to remind you that the Reform to the Criminal Procedure has been severely criticised because it does not provide enough security to people due to the legal guarantees it provides to offenders. This causes victims to feel abandoned and criminals, that are the only ones that have lawyers paid by the State, by contrast, feel well protected (Biblioteca del Congreso Nacional, 2007:251)

After looking at the way in which the debate around youth justice was carried out, several elements of what is being called "penal populism" can be identified. One of them is the use of "iron fist" (mano dura) measures that have been proved to be unsuccessful in terms of reducing crime in Latin America, as levels of crime have remained relatively stable since the transition to democracy. Giving standardised answers to crime does not tackle the differences between phenomena as different as organised crime and crimes committed by, for example, excluded young people (Kliksberg, 2008: 4). This is recognised by some members of this coalition, in the following example we can see that at the end justice should be the main goal:

If someone thought that when a young person commits an offence we have to offer them our understanding, this Act points out that we have to be understanding but also we need to punish them. Iron fist and a fair hand. It is

not the same to punish an adult than punishing a young person (Deputy from Party for Democracy 2005: 1037).

Children's rights coalition of advocates on nature of youth crime and their policy solutions

Since the ratification of the UNCRC, UNICEF representatives have reiterated on a number of occasions that in Chile children and adolescents were not considered rights' holders before the law and that was something that had to be changed urgently. Their role was crucial in promoting the idea that any violation of children's rights should also be considered a violation of human rights. During the military dictatorship and well into the 1990s it was not common to think about human rights beyond the abuse carried out by the military regime; therefore UNICEF had to do a serious job putting the topic in the public agenda.

It is clear that when it came to children's rights, Chile followed a policy of no action for a long period, even after subscribing to the UNCRC. During this period (early 1990s) common responses to youth crime continued to be imprisonment (in adults' prisons) or to be sent to a care home after being accused of an offence.

As I have previously described, during the period of the development of the current youth crime policy, stakeholders and policy makers were constantly trying to influence each other and impose their views, which can be clearly observed in the Parliamentary debate and is corroborated in interviewees' accounts. Changes of opinion are not easy to achieve by mere conversation. Negotiation of mutual gains are probably used more often when views are divided inside political parties and inside the government, and this was the case when the last changes were made to the Act on Adolescents' Penal Responsibility, just days before the date of its implementation in 2007. Parties sought to achieve mutually beneficial agreements through negotiation of their votes, as one of the interviewees who advocated for children's rights

describes:

“There is too much cliché [about the level of crime carried out by young people] and that had an impact on the legislative process I think. You had a small group in the Ministry [of Justice], myself and some other colleagues, that shared perspectives with the more “advanced” [in the sense of holding progressive views] group of people, to say it in some way, but we got extra pressure because of the lack of support from the political actors in the government and we had to bargain under those conditions with the right wing parties. We had to pretend we had a support that did not exist and we tried to impose some views and tried to play around with technical aspects of legislation because we did not have the votes, we did not have assurance in the parliament” (Policy makers and policy officers 1).

This shows a persistent problem that this coalition had to fight against during the long time that the Act was debated. At the beginning it could be said that they started with an advantage as the draft Bill was written taking in consideration children’s rights and could rely on close collaboration and support from UNICEF (as discussed earlier in this chapter). Children’s rights advocates began to see their position considerably eroded when the draft Bill started to be debated in the Parliament. In the next section I will explain the views of this coalition on the origins of youth crime and its solutions.

Youth crime explanations inside children’s rights advocates coalition

Using coalitions of advocates as an analytical tool can be problematic. The members of a coalition are not always consciously in a determined group (in this case this is because the groups were created *a posteriori*) although in some cases there is evidence that actors talk about others as if they were part of a determined group even if the group has not been formally formed. This can be observed in the case of actors talking about people intentionally using this youth justice reform as a way of gaining political support. Here one deputy comments that using this Act for political gains is something that should be avoided:

During the last 20 years politicians- and I include myself here, have resorted to -and using for their own benefit- what they think are the public attitudes towards crime, in particular youth crime. This is crucial. A serious country,

like ours, cannot respond in that form to a complex situation like this (Christian Democracy Party, Biblioteca del Congreso Nacional, 2005: 250).

After analysing the Chilean youth justice reform it becomes clear that some views held by advocates are shared with the rival coalition. It is possible for this to happen in the Advocacy Coalition Framework approach as long as those views are not “core beliefs”. An example of this is shown below where a children’s rights advocate links youth crime to the role of the family. However his view does contrast to those held by the citizens’ security coalition by going beyond blaming the family of the offender, also highlighting the circumstances and economic structure to which the family have to adapt:

There is an exponential growth of criminal or antisocial behaviour by young people in the world. Maintaining that the causes of this are permissive politics would be, in my view, a mistake, because the real reason is the way in which we are constructing society. This situation has relation to what is happening inside the family, and I am talking about the family in a broad sense, not just the Christian family. What happens during the time that parents are absent from their homes because they have to work for 12 or 14 hours? That has a direct relation to the situation we are seeing. And we should take responsibility for this from the preventive point of view. (Deputy, Christian Democrat Party, Biblioteca del Congreso Nacional, 2005: 251).

Close to this view we find:

There is a theme we need to go in depth: psycho-social harm that originates in the family. Families where there is domestic violence, where children leave school early, where there is sexual abuse, and above all, lack of affection, affection would teaches them how to be empathetic with other people (Deputy, Party for Democracy, Biblioteca del Congreso Nacional, 2005: 254)

Another advocate directly criticises the idea of moral decline in use by citizens’ security advocates. Even if this supposed decline exists, the criminal justice system would not be the place to solve this problem:

“The conception that moral deterioration, that some kind of intrinsic evil, that can be resolved through criminal law and not through a psycho-social point of view, which is wider and more complex. There is something scary there, when authorities, politicians that aspire to the presidency or other high level positions, have that conception of reality. Then citizens become victims of this, because you can’t ask the average person who gets information from

the television- where certain social representations of reality are promoted- that they have the sensitivity to realise that there are other factors as well. People get scared, anxious, have fear, and get angry and the TV insists on showing young people getting drunk, kicking people on the streets so people cry out for more punishment and the iron fist becomes a policy that people would vote for” (Civil society 1).

Advocates from the children’s rights coalition tend to locate the causes of offending in a broad and complex context and refuse to use the criminal justice alone to respond to social needs. There is a sense that people expect many things from the criminal justice system that it is currently not able to provide. Below there are two examples of this, one that emphasises mental health and poverty and other that mentions a structural problem affecting families and young people:

When dealing with problems in the family, with adolescents, minors... those problems are happening because of many different reasons. There are mental health problems, destitution, problems related to how people relate with each other, it is not easy for a judge to decide how to resolve this (Judiciary and institutions of justice 4)

Also,

Young people, and many times their families, have been punished with permanent unemployment. This, without a doubt, explains the increase of adolescents’ participation in criminal organisations and crime (Deputy Party for Democracy, Biblioteca del Congreso Nacional, 2005: 247)

In this coalition, descriptions of the type of adolescent that is more likely to offend are related to structural problems rather than to personal decisions made by young people. Several advocates suggest that to end criminal behaviour, ways to solve social problems would need to be found first:

The social information says that the family is dysfunctional...so when you have a risk based discourse, the risk factors are mainly referring to that. Although it may be very accurate, although this information may be a good way of predicting...but when I look at the list I see poor young person, poor young person, poor young person and you don’t get anything different that poor young people. And it is obvious because they have the bad luck that in their family the dad works 15 hours a day and drinks too much, and beats

their mum who works 10 hours a day and they have 10 more kids, therefore the kid is neglected (Judiciary and institutions of justice 1).

However, identifying who is more likely to commit a criminal offence should not be an excuse to stigmatise or criminalise young people that fit the stereotype. Also the problem of class discrimination and inequality before the law appears to be mentioned by children's rights advocates:

Young people have been stigmatised. Every time the media report that a minor has stolen from a bus driver or a tragedy has happened in a poor area and there are minors involved, young people are being stigmatised. They say that is a problem of the whole youth but I don't share that view.

More than 90 percent of young Chileans participate in sport activities, are in education and are involved in a series of positive activities. Therefore, the proportion that commits offences is very small. Despite this, it has been argued that they threaten citizens' security and as consequence, all young people are treated as suspicious. (Deputy Socialist Party, Biblioteca del Congreso Nacional, 2005: 274)

Another actor adds that young offenders' profiles can be clearly identified, for both adolescents and adults in the criminal justice system:

If we could create a profile of people that are convicted in Chile, we would find that the big majority didn't finish school, abandoned school, that they were in some kind of protection centre, were mistreated, suffered violence, a thousand risk factors, and I think that the case of young people is not different, I would say that is basically the same (Civil society 2).

Poverty is considered a cause of the problem and some actors consider that the Act would be a way to tackle the consequences of this. Also he wishes the immediate relation that people assume between poverty and crime could come to an end:

Without doubt, this project fits in with the effort that the country is making in order to reduce poverty. I hope that someday we are able to eliminate the identification between crime and poverty, because until now young offenders image is associated with a child who is poor. We have to break that coupling of poverty and crime and assure that this Act covers all young offenders without regard to where they were born because justice punishes poor people more and more and many times leaves adolescents from well off families totally unpunished (Deputy, Party for Democracy, Biblioteca del Congreso Nacional, 2005: 359).

While some views held by citizens' security advocates can be identified as an expression of penal populist ideas, children's rights advocates criticise the use of youth justice reform intentionally for political gains. In the first example a deputy condemns the deliberate demonisation of some sectors of the young population, while the second example warns about a punitive turn in the law that may be influenced by extreme or shocking cases that could appear in the future:

I am worried about the motives that inspire this draft Bill. Sometimes I get the impression that certain sectors have changed the internal enemy in the country. In the doctrine of security of the state the internal enemy was the political left and in these times of citizens' security, it is young people who are working class, those who live in Renca Nuevo o la Pincoya.
(Deputy, Party for Democracy, Biblioteca del Congreso Nacional, 2005: 253)

[We must] study this topic in depth and seriously. And we are doing it wrongly. This debate is taking us towards a punitive view. We are talking about 14 year old people, we are passing a law for them but a homicide where a 13 years old is involved would be enough to start a debate for a law that reduces the age of penal liability. And don't tell me that it's not true because for several years there have been proposals to drop the age of criminal liability to 12 years of age. (Senator Christian Democrat Party, Biblioteca del Congreso Nacional, 2005: 510)

The members of this coalition have demonstrated that it is their view that social policy will need to be changed to attempt to solve all of the issues that are related to offending, and that a change to the criminal justice system will not have this effect. If the punitive role of the criminal justice system is understood and accepted, what this coalition sought was the expansion of the guarantees of the due process to young offenders. Also the incorporation of children's rights into the law and the consideration of the increasing ability of adolescents to be held responsible for offences have been mentioned as important aims too. In summary, the goal of this coalition was to make the situation of young offenders visible and install the idea that children have the right to a different treatment before the punitive power of the state. These ideas can be observed in the following example:

Here we have a state vision that is different: we want another type of treatment for young offenders on the understanding that they are not

criminals because they want or because they just are like that as the old lombrosian theory stated. They offend in general because society has not opened opportunities to them.

(Deputy, Party for Democracy, Biblioteca del Congreso Nacional, 2005: 262)

It can be argued that this coalition was successful in this respect, as the majority of actors admitted that children are different to adults and some difference in their treatment should be made. Even among the citizens' security advocates some members agreed that sanctions for adolescents should be somewhat different from adults' sentences (although at the end these are linked to the adults' criminal code):

UNICEF could make that most actors involved recognise the idea that children have rights, and among those is the right to have a different relationship with the criminal justice system. When you understand that children have rights, then you realise that the prison system should not destroy their lives, but that is something that is not present in the views of the general public, I mean people say "but at the end of the day they are criminals, what do they want?"

(Academics and experts 1)

There is, as well, disappointment about the results of the reform process, not only related to the contents of the Act but also about the lack of resources (budget and human resources) to achieve sustainable changes that could make a real difference to the situation of young offenders:

I think that in the Parliament, what happened was that they slowly removed the differences between the criminal justice system for adults and for adolescents. I believe that part of the problem is that [the small amount of cases involving adolescents] this doesn't justify the amount of money that they need to invest (Academics and experts 1)

This includes the need for specialised actors and measures:

Recognising the human dignity of the child is what gives meaning to a specialised criminal justice system (...) the human dignity of the child requires a distinct relation with criminal law (Academics and experts 1)

Advocates from this coalition insisted that the Act is too closely related to the adults' system and lacks of the flexibility needed to avoid formal procedures that could damage adolescents:

I think that a central issue in a system of adolescents' criminal responsibility is that the institutions in charge of applying sentences and measures should have plenty of discretion so they can decide whether to admit cases for formal procedures or not. I think that in this point the system is quite close to what happens in the adults' system (Academics and experts 2).

Despite their critique of formal and practical aspects of the Act, there is recognition of aspects that they view as successful, for example, the recognition of the right to have a different relationship with the criminal justice system (as seen above) and the expansion of the protection of the guarantees of the due process for adolescents:

The positive part is that it was attached to a system that at least protects basic guarantees. It offers an umbrella, a starting point from which you can start the conversation in a rational way, I mean, before this was a black box, and today you don't have that, you have a more transparent situation, with basic standards that can be claimed (Academics and experts 2).

Concluding remarks

This chapter has discussed the ideas that guided youth justice reform in Chile. The contents of this chapter are organised using an analytical tool developed by Sabatier and Weible consisting of identifying groups that share beliefs and ideas about a policy. These groups are called "coalitions of advocates". Using information from interviews conducted during fieldwork and the contents of parliamentary debates published by the parliament's library I could identify two principal coalitions of advocates which I named "citizens' security coalition of advocates" and "children's rights coalition of advocates". There were two other groups that participated very marginally in the debate (especially in stages previous to parliamentary debate): a neutral group and a group that agreed with maintaining tutelary views.

In the first part of the chapter a general description of the origins of these groups was given. In the second part their views expressed during debates in the Parliament and in interviews were presented. Advocates' ideas were organised around two main aspects that were present during the debate: their views on youth crime (what do they think are the causes of youth crime?) and the solutions that they promoted in order to deal with youth crime.

In conclusion it can be argued that both coalitions had success to some extent, as guarantees and punishment are both included in the current Act. The influence that the children's rights coalition had in the draft Bill presented by the government in 2002 was not enough to ensure that in Parliament their views were accepted (even though they were present at several points of the debate). It can be seen in that there was an evident deviation from the draft Bill.

Several topics seen in the literature were present in the debate. For example, the moralising role of the family and its importance in keeping children and young people under control was mentioned by advocates from both coalitions, although emphasising different aspects of this. Also the complexity of the causes of crime was pointed out along with the idea that the criminal justice system is not able to deal with all the problems that adolescents bring into the courtroom. Some people insisted on the punitive side and others criticised this. Illustrations of this include the use of crude examples of the dangers of leaving young people unpunished by the citizens' security coalition, while advocates of children's rights criticised the use of high impact cases with the aim of criminalise young people.

Finally, it is worth providing a word of caution on the use of this method in the organisation of a large amount of information into two groups. As I have tried to make clear, people's opinions can be more nuanced and hard to define than this model can allow for. There are likely to be a range of views across the coalitions, and some actors hold views that could possibly allow for them

to be included in either group. However, I consider that it has been of use in the summary of a long and often complex debate.

Chapter 6 Adolescents in conflict with the law in Chile: Approaches and evolution

The purpose of this chapter is to document how the Chilean youth justice system has changed through time. To start I describe the situation of adolescents accused of committing an offence before the implementation of the current Act, when the Minors' Act was in use. For this period, I describe the legal articles related to children in conflict with the law⁷⁴ and how the legal rules applied in practice as seen in previous studies. A selection of judicial cases for the period 2002-2004 is also examined. For these cases I concentrate on the elements most commonly used for deciding the outcomes of the legal process. The aim of doing this is to show the contradictions between the rhetoric of protection and welfare, the objectives claimed in the law, and the outcomes of it in practice. In particular we can observe that the results of what was known as the "discernment procedure" were in conflict with ideas of helping the most vulnerable young people to have a life away of crime. Using logistic regressions it could be seen that the presence of the most adverse situations are more likely to result in a decision of being considered able to discern between right and wrong. The consequence of this for adolescents between 16 and 18 years old was to be diverted towards criminal courts where they were sentenced in the same way as adults although with slightly shorter lengths for their sentence.

Subsequently, the main features of the current Act are described. The principal aims of the Act are explored and their presence in a second sample of judicial cases (collected for the period 2007-2009) is described. It is important to note that some features in the judicial files themselves have changed because of the changes in legislation. First, the source of the files had to change due to difficulties of access during the fieldwork. For the first sample, the files were provided by charities that provided legal aid to

⁷⁴ The Minors' Act did not contain elements that would help demonstrate that an offence had been committed or the degree of culpability of the defendant as dealt with adolescents that were classified as not liable for their possible criminal behaviour. Nevertheless, being accused of committing an offence could mean spending indefinite amounts of time deprived of liberty or serving another kind of sentence.

adolescents. The second sample was obtained through the Office of the Public Prosecutor and this meant that the emphasis of the information was somewhat different. Secondly, the “discernment procedure” was abolished and all the cases concerning offending by adolescents are now seen either in magistrates or criminal courts (in Chile these are called oral-penal courts) depending on how serious offences are. The elimination of the discernment procedure along with the focus on culpability and individual responsibility has resulted in a very limited depiction of personal circumstances during the sentencing process. Currently, personal circumstances are only considered when a personal plan of intervention is developed by agencies in charge of carrying out the different measures and this is done after sentencing in a separate hearing, and details of this are not always included in the judicial files. This made it impossible to compare which adolescents’ characteristics are taken into consideration at the moment of sentencing, although the judges interviewed could give some insight about this particular topic.

Due to theoretical and practical reasons, particular attention is paid to two moments in the judicial process: first, the encounter with the police, summarised in the police records that each judicial file contains, and second, the outcome of each case. The role of the police in constructing and shaping the destiny of the cases has proved crucial (see for example, McBarnet, 1976, McConville et al., 1991, Reiner, 2010). Although issues such police abuse cannot be traced when examining police reports, the description of the events and statements from officers, victims and detainees are usually the core information that the prosecution uses for constructing the cases. As McBarnet (1976) puts it, the criminal system does not search for the truth when deciding about a case but rather arrives to the most reasonable explanation of what has happened and the police are in a privileged and powerful position to determine or influence the way in which the case will be understood.

The focus on the outcomes of the cases is displayed in order to show the type of sentences commonly used for different offences before and after the reform, and giving indications about the elements that could guide the decision making process. This can be only partially achieved because of lack of information in a significant amount of cases, as well as the way in which decisions are recorded (arguments that justify judges decisions are mainly limited to references to sections of Acts or mentioning some articles of the UNCRC). Under the Minors' Act the focus was on "discernment procedure" outcomes which determined how a case would be treated (see Pre-reform diagram of the procedure under Minors' Law in Appendix A). One of the main flaws of the old system was the punitive treatment of cases where adolescents may not have committed any offence. I aim to highlight the counterintuitive results of the discernment procedure carrying out a series of logistical regressions that confirm that the most deprived or problematic cases were diverted from protection to the criminal system. Adolescents with fewer resources to control or understand their own behaviour were more likely to be deemed as discerning and therefore be prosecuted in an adult criminal court.

The Minors' Act of 1967 and its treatment of young offenders

The Minors Act of 1967 is part of what has been called "abnormal circumstances" doctrine (*doctrina de la situación irregular*, in Spanish). This model of dealing with problems related to children and adolescents⁷⁵ is characterised by a mix of repression and protection aims, and was based on

⁷⁵ In Spanish speaking countries, the use of the words child and minor is different depending on the characteristics of children. In legislation the word minor referred to problematic, excluded and needy children. This method of definition has been gradually changed in formal settings while the Minors' Courts have been replaced by Family Courts that deal with children rights protection and family issues such as divorce and maintenance. Nonetheless, this difference between socially integrated children and those in need or involved with the criminal justice system is still alive in the media and the everyday language where headlines containing the word "minor" are common when reports refer to crimes in which adolescents or children are involved. García Méndez (1994) summarises this and includes the fact that there are separate institutions in charge of each group of children *"For children, family and school will take on control and socialisation function. For minors it will be necessary to create a different instance of socio-penal control: the minors' courts"* (p.2, own translation).

a positivist stand point, which tended to define and solve social problems as if they were medical problems, arguing that the idea is protect and cure rather than to punish children's anti-social or criminal behaviour (García Méndez, 1994). The aspirations of the legislation related to this doctrine were considered so honourable that any problems of implementation were seen just as a distortion of those ideals and were not taken as evidence of a systemic failure. Until the early 1990s there was an assumption from the government and many others within the justice system that the principles were sound and that any problems arose from a lack of funding for re-socialisation programmes or other practical issues. This assumption prevented a deeper rethink of the ideals and ideas on which the system was based.

In Chile, the idea of not treating those who were under age in the adults' criminal system was based on the belief that they were people who had not yet formed their judgement. Despite this, the Minors Act from 1928 (Act 4447) did not ban underage people from adult prisons and only established that they should be placed in sections separate from the ones occupied by adults⁷⁶. This Act set the principles of the "abnormal circumstances" doctrine in Chilean legislation as can be seen in the introductory message of the Act:

"In fact, on one hand, the abandoned or delinquent child is a serious and urgent symptom that we have to remedy, on the other hand, is a permanent danger that needs to be corrected (...) abandonment and juvenile delinquency, are above all due to the abnormal constitution of the family and this lack of organisation in the family is caused by lack of parental responsibility or immorality. The consequences of this, of extreme interest for the conservation of society and the race, are so visible that we insist that the solution to this problem is extremely urgent" (Introductory message to the Act 4447 quoted in Tsukame, 2008: 80, own translation).

The "abnormal circumstances" doctrine emphasised the role of the environment in which the child lives in a form that goes beyond the plain inheritance of personal traits from their parents. This paradigm considers

⁷⁶ In this Act the age of criminal liability was raised from 10 to 16 years old.

flaws in children's socialisation in the sense of learnt behaviour influenced by the family, school and peer group. The idea behind this approach relies on the idea that an abnormal socialisation would result in lack of observance of social norms.

The way of dealing with young defendants rhetorically emphasised child protection. The focus was not on the offence or culpability of the adolescents accused of offending but on personal and family circumstances. The old system functioned using a procedure based on assessing how capable a youth was of knowing the consequences of his or her actions and how they should behave. The procedure for determining the ability to recognise right from wrong and behave accordingly was known as the "discernment procedure" and was regulated by the Act 16618 of 1967, also known as Minors' Act. This Act covered issues related to children's rights violation, children in vulnerable situations and adolescents in conflict with Penal Law. The minors judge had the role of deciding if an adolescent was discerning or not and documented their decision using the information gathered by a team of social workers and psychologists that described the adolescents situation and recommended an outcome to the judge. The discernment procedure had two possible outcomes:

- The judge decided that the young person was deemed able to discern between right and wrong, in which case they would be treated as an adult and the case was sent to an adults' criminal court.
- The young person was deemed not able to discern between right and wrong. In this case, the youth would remain in the protection system and be treated under the Minors' Act.

In the following section the structure of the procedure established by the Minors' Act from 1967 is described using data from judicial cases.

The structure of criminal procedure in practice

Situation before the implementation of the Act on Adolescents Penal Responsibility described using information from young people's judicial files.

Contact with the police

Before June 2007 the treatment of adolescents between 16 and 18 years old in Chile was mixed. The main element that judges from the now defunct minors' courts (which were replaced with family courts in October 2005) had to decide was whether the adolescents accused of committing the offence were able to evaluate if their own behaviour was appropriate. This decision would shape the destiny of a case. If an adolescent was deemed as not able to discern between right and wrong, their case would be seen by a minors' court where the most likely outcome was a "protection measure". If the adolescent was deemed as discerning, the case would be seen in the criminal court where trials were undertaken in the same way as adult cases, although the length of the convictions would be shorter for adolescents.

The first steps of a case consisted of a referral to the Minors' Court by the police. The police had a specialised section that had the power to "pick-up" children and adolescents if they were found in "abnormal circumstances", which meant, broadly speaking, situations where they were in need of protection or help. The police were also able to arrest underage people suspect of offending. In practice the arrest of people under the age of eighteen was carried out by regular police but their custody and transport was carried out by these special units known as "minors' police".

There was also a difference if the adolescents were arrested because of a serious or a minor offence. For a minor offence, the police had to let the suspect go with a notice to appear in court. In the case of being arrested for serious criminal offences, the police could detain them for up to 24 hours and

had the obligation of take them before a judge during that period. One of the problems of mixing the detention of children in need and children accused of offending was that they were often held together in police units, although it has been suggested that this was progressively solved in certain police stations (see Riego and Tsukame, 1998: 6). According to Riego and Tsukame (1998), the discretion to arrest on grounds of vagrancy was used as a crime control measure by the police and the judiciary. This was one of several ways in which the aims of child welfare and crime control were confused under this system.

After adolescents were arrested by the regular police they were taken to the local police station where a police report was produced. This could take several hours and it was common that the trip between the place of arrest to the police station was shared with adults in the same van. After the report was written, adolescents would have to wait for the specialised police to arrive. Only once this trip was completed the adolescents' parents were contacted. Although the law indicates that underage and adults should not be in contact during the time they spend in the police station, this was not always the case as has been documented in some studies⁷⁷ (for example Riego and Tsukame 1998; Bernales and Estrada, 2002).

In Riego and Tsukame (1998), some judges who were interviewed criticised that the same type of jargon is used for adults and children in the police reports as this may have the effect of in prematurely criminalising the children involved. These judges claimed that it would be better for the specialised police to produce the reports as it was likely that they would be more aware of the circumstances of the child. These authors also found that minors' police stations were working under pressure (there are only two units based in Santiago) and had difficulties covering problems caused by high demand (including issues such as lack of transport and food for those

⁷⁷ According to Riego and Tsukame 1998 the police were not convinced of the need of the separation between minors and adults, they quote a police officer stating that "supposedly the minor hasn't seen anything, but maybe he has already seen everything" (1998: 8).

detained). These issues had an impact on the efficiency of their work; in particular, it made it difficult to transport adolescents whose discernment ability had not yet been evaluated. The procedure for doing that is detailed below:

- First, officers had to travel to the pertinent criminal court that would declare itself unable to hear the case until the minors' court confirmed that the adolescent could be liable for their offence. In doing this, officers were usually kept waiting around until the adolescent was seen by the court and this was generally regarded as an obstacle to their work.
- After that, adolescents had to be taken to a diagnosis centre, where a psycho-social report would be produced for the minors' judge (see Riego and Tsukame, 1998: 9-10).

Case files

In the previous section I covered contact between the young person and the police. In that section I mentioned a number of documents that are required to be produced including the psycho-social report and police reports. Next, I will look at the judicial files in more detail and based on this I will provide an analysis of the main features of the process.

For the pre-reform period I worked with both the original GTZ sample of 317 cases and a sub-sample of this dataset containing 62 cases. I obtained physical copies of the subsample of cases in order to be able to give a qualitative account of their construction and contents.

Looking at the judicial files where young people are involved, the first document found is a report by the police. The report mainly provides a description of the circumstances of the arrest. Following this, a medical report will usually be present, indicating if the detainees are injured. Police records also collect statements from the police, detainees, victims and witnesses. There will usually be a record of whether formal procedures were

followed. These include a record stating if detainee's rights have been read or not, which is typically backed up through a form that the detainee will sign to confirm that this was done. There is also a form used to confirm that a parent or other responsible adult has been contacted and informed about the arrest. The police generally add a summary of previous records of detainees.

Data about the detainee can be found next (name, address, age, nicknames), followed by information about the circumstances of arrest (place, time, officers involved). Police argot is widely used in the following example:

"in circumstances that police personnel was performing traffic tasks at [street] the victim was abruptly approached by the detainee [...] being the police personnel alerted of this situation, they went out chasing the individual who was apprehended a few metres from the place and was recognised by the victim as the author of the offence imputed to him. Later the individual was transferred to the hospital where he was checked for injuries and then he was transferred to this police unit to follow with the obligatory procedures" (Judicial case, robbery, 2002).

The majority of the cases concerned property offences. These cases were in generally straightforward to deal with as they refer mainly to robberies committed very close to places where police were patrolling and people were usually just escaping the scene when police caught them.

Table 17 Type of offence in pre-reform sample of judicial cases

Type of offence			
		Percent	Cumulative Percent
Valid	Offences against the person ¹	2	2
	Property offences ²	89	92
	Sexual offences ³	.8	92
	Drug offences	1	94
	Other offences	6	100.0
	Total	100.0	

1. Includes homicide, manslaughter, assault and inflicting bodily harm.

2. Includes robbery, burglary, theft and shoplifting.

3. Includes rape and sexual assault.

The information concerning the contact with the police that could be identified from reading the police reports were:

- the presence of any kind of evidence related to the offence,
- the recording of injuries suffered by detainees, and
- if the offence was committed under influence of alcohol or other drugs.

In most of the cases analysed (88%) the police presented some kind of evidence which consisted mainly of stolen goods that had been recovered in the great majority of property offences cases. Also the police presented to the court weapons used to commit the offence. In the judicial files analysed, the majority of cases had some form of evidence of the offence (in 58 out of 63 cases), even though, as it has been stated before, if the adolescent was deemed as not discerning, the offence would not be investigated further.

Injuries were reported in 41% of the cases. From checking the subsample of cases it could be observed that most injuries were not serious and consisted of bruises and cuts. In 32% of the cases, the medical report stated that the adolescent was unharmed and in the rest of the cases (27%) the medical report was not presented. In the sub-sample of files, half of the adolescents arrested (32 out of 63) have some kind of injury, 21 are unharmed and in 10 of the files there is no information about injuries. There are no cases where serious injury is documented. In some of the cases where injuries are present, the report includes a small paragraph stating that *"the detainee resisted arrested and the police personnel had to use reasonable force"*. A study involving interviews with young offenders carried out by Jiménez (1998), revealed that abuse of force by the police is something widely spread and its main purpose is to obtain confessions from detainees. These findings coincide with other studies such as Riego and Tsukame 1998 and Bernaldes and Estrada 2002. However, from my assessment of a sample of judicial files, it is not clear whether there was a clear aim of gaining confessions, as the number of confessions made in the police station was only 9 out of 43 cases.

Alcohol or drugs use at the moment of offending was mentioned in 21% of the cases but there was no evidence provided to confirm this. Looking at the subsample of cases analysed in this section, alcohol or drugs use also appear in a minority of reports (in 17 out of 63) but test results are absent and therefore it can be said that there is not clear evidence of this. In most of the cases where alcohol or drugs are mentioned this occurs when detainees provide police statements, court statements or in the psycho-social reports. When alcohol or drugs are mentioned by the detainee this is usually to show that their ability to exercise self-control was diminished at the moment of offending, like in the following example:

I was with my friend and classmate XX and we had the idea of asking people passing by for money to buy beer and photocopy some things. We told her "Mrs give us money!" and when the lady saw us she may have felt intimidated because I said it in other tone and I had been drinking. The lady

gave us money and when we were walking the police appeared and arrested us. (Judicial file 2177).

In a second statement the adolescent states that they did not threaten the lady. He says that they were drinking and he was not drunk but just “a bit tipsy” and he does not ask for money in the street normally, they just wanted to carry on drinking that day.

This lack of information about use of alcohol or drugs is also present in Jiménez’s study. She found information about drugs and alcohol consumption only in 25% of the cases and only in half of those cases was alcohol use confirmed by a test. For other drugs, only a 14% of the cases were confirmed with a test. In the rest of cases it is not possible confirm if the offence was committed under the effect of drugs.

The study carried out by Jiménez (2000) contained an extensive review of official data, judicial files and also interviews with 160 adolescents that were held in custody while the psycho-social reports were assessed by the minors’ courts in order to decide their criminal liability. In this group she found that the majority (138) had been detained by the police more than two times during their lives. The same group affirmed that they had been stop and searched frequently, usually with the aim of finding weapons. Although the Minors’ Act of 1968 established that people between 16 and 18 years old were only to be detained in a police station specialised for young people, most adolescents were detained in both, adults and minors police stations (79% of the interviewees) and only 1% were detainees in a minors’ police station. The Minors’ Act also indicates that the adolescents must see the judge within 24 hours of their arrest. In that time they should not share the same space with an adult. The report indicates that, based on interviews with young people detained in youth centres, of the adolescents who spent between two and twenty four hours in an adults’ police station, 62% stayed there between six and thirteen hours. The significance of this is that it shows

that there was not always an effort to minimise the time the young person stayed in the police station for adults.

Related to rights' observance when in contact with the police, Jiménez's study highlighted major differences between how young people were treated in adult police stations and in those specialised in working with children and young offenders. In minors' police stations, 62% of detainees declared that they had been fairly treated, whilst in adult police stations, 80% indicated that they had been victim of some kind of mistreatment. The mistreatment was generally carried out with the aim of obtaining confessions for offences according to the interviewees.

In the sub-sample of files reviewed here, these tendencies are confirmed. When information about the rights of detainees is present in the files, it is to show that the police read the list of rights to the detainee, even when in some cases the adolescent refused to sign the form included in the police report. Typically a form of information of rights has the following contents:

According to the article 284 of the Penal Code, the rights of the citizen were read to the detainee.

The detainee has the right to:

- *Know the reason of their detention*
- *Their family or other chosen person is informed that they have been detained and the place where they are held (this has to be in presence of the detainee)*
- *Talk to their lawyer and being informed about availability of state defence lawyers if needed*

The right to talk to his lawyer or the provision of a public defence lawyer is mentioned even when in reality the access to a lawyer was deemed as not necessary according to the Minors' Act. This could be because the format

used at the moment of detention is generic and the age of the detainees is not confirmed until later on or due to carelessness as it a procedure that takes place in adults' police stations.

Unfortunately, the practice of the police cannot be evaluated by simply reading the judicial files contents. In the majority of cases, the formal requirements for the police appear to be accomplished in the documents provided by the police, for example, confirmation of reading the detainees' rights is present in most of the cases, as well as medical checks for injuries. In the case of injuries, the way in which these were acquired tends to not be mentioned or the report implies that injuries are product of resisting arrest. There are other studies covering this aspect where police abuse is mentioned by different actors of the system (see Bernales and Estrada, 2002, Jiménez, 2000, Riego and Tsukame, 1998). Tsukame and Riego (1998) found that every actor, apart from the police, mentions that is common for the police to abuse their power towards children and adolescents, principally in the police stations that are not specialised in children and young people. According to these authors, judges argue that the normalisation of mistreatment is justified by a common belief among the police that young offenders are given freedom "too quickly" and therefore any mistreatment from the police is the only real punishment that they will get for their behaviour. Police abuse in these cases is very difficult to prove and when it has been reported by minors' judges to criminal courts the cases have not being taken further and therefore there are not sanctions for the police. The authors also state that in some cases magistrates call police agents to court to question them about this topic but they deny the events and there is no further investigation.

The “Discernment procedure”

Once the youth’s case was heard by the judge the next stage consisted of waiting for the results of a psycho-social report. According to Jiménez (2000), among young people arrested by the police, 85% were interned in a juvenile detention centre until the report was completed. At that point, the judges did not justify their decision to keep adolescents waiting in custody for the report and did not establish how long the adolescents would be detained for. Jiménez also found that 45% of the adolescents had been subject to “discernment procedures” between two and five times. The team that completed the psycho-social report consisted of a social worker and a psychologist. They provided the judge with information about the social circumstances of the adolescents and recommended measures to take. In Jiménez study these teams suggested in 47% of the cases that the best solution would be to send the adolescents back with their parents. In the same proportion, the report recommended some kind of therapy (for treatment of drug abuse or psychological issues). Only 5% of the reports recommended imprisonment as the best solution. Exploring the database provided by the GTZ, the proportion of cases where the measure suggested in the psycho-social report was to return the adolescent to his family was only 6.1%, which is considerably less than in Jiménez study. In 11.3% of the cases the recommendation involved deprivation of liberty. The measure most frequently recommended (in 53.1% of cases) was to send the youth to a programme of intervention in the community or “assisted liberty” (similar to probation).

The destiny of a case was critically defined by the results of the “discernment procedure”. An analysis of this procedure using the original GTZ’s dataset (327 cases) is shown below. In the majority of cases the adolescent was deemed as not able to discern between right and wrong (82% of decisions in the Minors’ Courts which increase to 91% of cases in the Court of Appeals). In order to explore which elements tended to influence judges’ decisions, a series of logistic regressions of the data were carried out. Guided by

information from other studies (principally the ones mentioned in this section and Farrington 2003) and interviews with key informants, I used the variables obtained from psycho-social reports to find which features helped to predict the probability that an adolescent would be deemed as a discerning person.

The independent variables considered for these logistic regressions were obtained by organising the contents of the psycho-social reports into the following dichotomous variables:

1. Psychological problems (Yes =1): Lack of empathy, lack of self-control, narcissistic elements in their personality, immature, minimise risky behaviour.
2. Learning difficulties (Yes =1)
3. Family difficulties (Yes =1). Poverty/unemployment of parents, domestic violence, not able to establish limits and habits, alcoholism or drug use of parents, parents involved in criminal activities.
4. Schooling problems (Yes =1). Not attending school.
5. Drug abuse (Yes =1)
6. Alcohol abuse (Yes =1)

Two logistic regressions analysis using the backwards selection method⁷⁸ were conducted to identify which of these elements predicted different decisions about discernment in both the Minors' Court and the Court of Appeals (second instance level of decision in charge of reviewing Minors' Courts decisions). The dependent variable was defined as Not Discerning= 0 and Discerning=1 for both models.

⁷⁸ Backward selection begins with all the variables selected, and removes the least significant one at each step, until none meet the criterion.

Discernment procedure in the Minors' Court

For the model predicting decisions in minors' courts the test of the full model against a constant only model was statistically significant, indicating that the predicting variables as a set help to distinguish between the decision of discernment and lack of discernment (chi-square= 319,82, df=6, sig=.00).

The use of a backwards stepwise mode was considered to be the most appropriate because the selection of independent variables was based on theory and it was needed to discard variables that did not contribute to the model rather than trying variables by the means of introducing them in the model in successive steps, which is what a forward method does.

In the following tables, the contribution of the variables is shown. Three steps were carried out to get the final model containing the variables that have an impact on the decision about discernment. These variables were:

- psychological problems (ps_emo),
- learning difficulties (ps_cogn),
- schooling problems (ps_sch), and
- alcohol abuse (ps_alcoh).

Exp(B) values indicate the number of times that the chances of being deemed as discerning increase when the independent variable value increases. In this case we can sustain that when a psycho-social report mentions that the adolescent has psychological problems or learning difficulties the chances of being classified as discerning increase around two times (Exp(B) 1.815 and 2.264 respectively). When the adolescent does not attend school they are almost three times more likely to be deemed as discerning than if they attend (Exp(B) 2.848). For alcohol abuse the value of Exp(B) is less than 1 (.831) indicating that as this predictor increases the chance will decrease of being classified as discerning. The confidence interval for the odds ratio indicate that we can be fairly confident (95%

confidence was established for this model) that the population value of the odds ratio would be in the ranges shown in the table “variables in the equation”. In the model only alcohol abuse cannot be used to predict the possibility of being classified as discerning in the Minors’ Court.

Table 18 Logistic regression predicting decisions in minors’ courts

Variables in the Equation								
		B	S.E.	Wald	Sig.	Exp(B)	95% C.I. for EXP(B)	
							Lower	Upper
Step 1 ^a	ps_emo(1)	.568	.142	16.119	.000	1.765	1.337	2.329
	ps_cogn(1)	.813	.083	94.924	.000	2.254	1.914	2.655
	ps_fam(1)	.095	.120	.623	.430	1.099	.869	1.391
	ps_sch(1)	1.017	.100	104.129	.000	2.766	2.275	3.363
	ps_drug(1)	.085	.081	1.109	.292	1.089	.929	1.276
	ps_alcoh(1)	-.203	.086	5.494	.019	.817	.689	.967
	Constant	-3.436	.172	398.659	.000	.032		
Step 2 ^a	ps_emo(1)	.579	.141	16.899	.000	1.785	1.354	2.352
	ps_cogn(1)	.820	.083	97.848	.000	2.271	1.931	2.672
	ps_sch(1)	1.031	.098	109.908	.000	2.804	2.312	3.400
	ps_drug(1)	.091	.081	1.257	.262	1.095	.935	1.282
	ps_alcoh(1)	-.204	.086	5.599	.018	.815	.688	.966
	Constant	-3.382	.157	463.112	.000	.034		
Step 3 ^a	ps_emo(1)	.596	.140	18.096	.000	1.815	1.379	2.388
	ps_cogn(1)	.817	.083	97.188	.000	2.264	1.924	2.663
	ps_sch(1)	1.047	.097	115.430	.000	2.848	2.353	3.447
	ps_alcoh(1)	-.185	.085	4.786	.029	.831	.704	.981
	Constant	-3.357	.155	466.617	.000	.035		

a. Variable(s) entered on step 1: ps_emo, ps_cogn, ps_fam, ps_sch, ps_drug, ps_alcoh.

Note: $R^2 = .062$ (Cox and Snell); .105 (Nagelkerke) Significance level used $<.05$

Finally, a table showing what would happen in every step if variables are removed is presented. This table shows what variables would affect significantly the predictive ability of the model if removed (sig of the change column). For the step 3 this table confirms that the variables psychological problems, learning difficulties, school attendance and alcohol abuse help to predict the chances of being deemed as discerning.

Model if Term Removed					
	Variable	Model Log Likelihood	Change in -2 Log Likelihood	df	Sig. of the Change
Step 1	ps_emo	-2282.706	17.983	1	.000
	ps_cogn	-2324.120	100.811	1	.000
	ps_fam	-2274.030	.632	1	.427
	ps_sch	-2333.016	118.603	1	.000
	ps_drug	-2274.270	1.112	1	.292
	ps_alcoh	-2276.507	5.586	1	.018
Step 2	ps_emo	-2283.492	18.923	1	.000
	ps_cogn	-2325.986	103.911	1	.000
	ps_sch	-2336.835	125.609	1	.000
	ps_drug	-2274.661	1.262	1	.261
	ps_alcoh	-2276.877	5.694	1	.017
Step 3	ps_emo	-2284.855	20.387	1	.000
	ps_cogn	-2326.261	103.200	1	.000
	ps_sch	-2341.007	132.692	1	.000

ps_alcoh	-2277.095	4.867	1	.027
----------	-----------	-------	---	------

Significance level used was <.05

Discernment procedure in the Court of Appeals

The test of the full model against a model containing only the constant is statistically significant, in other words, the set of variables chosen for this model contribute to predict the decisions of this court in respect to the discernment procedure (chi-square=161.2, df=6, sig=.00).

The best predictors of decisions in the Court of Appeals were cognitive issues, family circumstances, school attendance and use of drugs and alcohol. The most influential of the variables was family circumstances. The increment in the variable increases the chance of the decision to deem the youth as discerning by three times. (Exp (B) = 3.25). School attendance and use of drugs double the odds of adolescents being deemed as discerning in the Court of Appeals. The only variable that did not contribute to the model, and was therefore discarded in the second step, was the one covering psychological problems. This meant that this variable did not help to predict the decision. Once again alcohol abuse was not a good predictor as its prevalence actually decreases the chances of a decision classifying the adolescent as discerning.

Table 19 Predicting decisions in court of appeals

Variables in the Equation								
		B	S.E.	Wald	Sig.	Exp(B)	95% C.I. for EXP(B)	
							Lower	Upper
Step 1 ^a	ps_emo(1)	.280	.202	1.920	.166	1.323	.890	1.966
	ps_cogn(1)	.489	.116	17.672	.000	1.631	1.298	2.048
	ps_fam(1)	1.157	.256	20.483	.000	3.181	1.927	5.250
	ps_esc(1)	.867	.148	34.357	.000	2.380	1.781	3.181
	ps_drog(1)	.706	.126	31.362	.000	2.025	1.582	2.592
	ps_alcoh(1)	-.240	.121	3.946	.047	.787	.621	.997
	Constant	-5.185	.317	267.025	.000	.006		
Step 2 ^a	ps_cogn(1)	.498	.116	18.423	.000	1.646	1.311	2.067
	ps_fam(1)	1.177	.255	21.260	.000	3.246	1.968	5.354
	ps_esc(1)	.876	.148	35.171	.000	2.402	1.798	3.208
	ps_drog(1)	.717	.126	32.443	.000	2.047	1.600	2.620
	ps_alcoh(1)	-.235	.121	3.794	.051	.791	.624	1.001
	Constant	-4.971	.274	329.046	.000	.007		

a. Variable(s) entered on step 1: ps_emo, ps_cogn, ps_fam, ps_esc, ps_drog, ps_alcoh.

Note: $R^2 = .035$ (Cox and Snell) $.086$ (Nagelkerke) Significance level used $<.05$

It can be seen that removing any variable apart from psychological problems would affect the predictive ability of the model. Here it is interesting to note that alcohol abuse is very close to not contributing to the quality of the model with a significance of 0.049.

Model if Term Removed					
Variable		Model Log Likelihood	Change in -2 Log Likelihood	df	Sig. of the Change
Step 1	ps_emo	-1308.685	2.049	1	.152
	ps_cogn	-1316.857	18.393	1	.000
	ps_fam	-1321.653	27.985	1	.000
	ps_sch	-1327.548	39.776	1	.000
	ps_drug	-1324.690	34.059	1	.000
	ps_alcoh	-1309.685	4.049	1	.044
Step 2	ps_cogn	-1318.283	19.197	1	.000
	ps_fam	-1323.317	29.264	1	.000
	ps_sch	-1329.096	40.822	1	.000
	ps_drug	-1326.332	35.295	1	.000
	ps_alcoh	-1310.630	3.891	1	.049

Significance level used <.05

The models created have shown the capacity for predicting which variables were more likely to be considered as important for judges when it came to deciding that certain adolescents were aware of the wrong of their behaviour at the moment of committing the offence. This decision has been shown to be counter-intuitive as a person with more troubles, would lead to them being more likely to be deemed as discerning.

The findings from exploring which elements are correlated with the decision of estimating an adolescent as able to discern between right and wrong coincide with the information provided by interviewees and previous studies about the situation of children in the Chilean system of justice. The

probability of being classified as “discerning” was related to the quantity and quality of extra-judicial problematic characteristics of the case and also to the level of risk of re-offending perceived by decision-makers.

Arguments used to justify decisions about discernment

Under the Minors’ Act there were two levels of decision about the destiny of a case: the minors’ court and the court of appeals. When a case was opened in the criminal court, the age of the accused had to be checked and in the case that the accused was between 16 and 18 years old, the first step was asking the Minors’ Court if he or she was a discerning person. Once the case was sent to the Minors’ Court, the judge required a psycho-social report from the National Minors’ Service. In this report, psychological and social characteristics were assessed and a recommendation was made to the judge on the ability of the accused to distinguish between right and wrong, as well as providing options about protection measures. Using these reports and their own judgement on the case, the judge made a decision that had to be approved or rejected by the court of appeals⁷⁹ in a routine procedure for reviewing decisions issued by lower courts. In several judicial files I found a formulaic way for justifying decisions in which some legal articles were mentioned as the main element for taking a decision. In most of the files where a justification was present, the argumentation was presented in similar fashion to the example that follows:

Considering the merits of the antecedents and pursuant to the provisions of the articles 29 No. 2 and No. 36 of the Act 16618 (Minors’ Act), the minor has been given a warning and it is decided that he will be kept under the responsibility of his mother who shall make sure he is attending school or he holds a job.

His mother should control his behaviour strictly outside their home.

The minor will be subjected to a program of assisted liberty [equivalent to parole].

Inform officially and register this decision. (Judicial case 2068)

⁷⁹ The court of appeals was also known as Ministerio Público before the changes introduced with the implementation of the reform to the penal procedure. This court has powers to review decisions of a lower court.

The material quoted by the judges refers to the information retrieved from the psycho-social reports. This report is mentioned in all the cases in which a justification is included in the file and it seems to be the most important element when it comes to taking a decision. Even in the cases where the recommendations of action and measures mentioned in the reports are not followed by the judge, the contextual information is used in their justification. The ability to respond to treatment and the likelihood of a behavioural change was mentioned in some cases as well.

The most quoted pieces of legislation, in both minors and court of appeals, were the UNCRC and the Minors 'Act of 1967. From the UNCRC, articles 1 and 2 were the most mentioned. Article 1 of the UNCRC defines a child as *"every human being below the age of eighteen years"*, while article 2 establishes that children should not be discriminated against on any ground as well as indicating that every state who is a member should make sure that the child is protected against any form of discrimination. As the articles are simply quoted without using any comments on their contents, it is not possible to know with certainty why the judges used them in their statements. One possible reason to quote the first article of the UNCRC could be because it defines who children are and therefore may be a way for the judge to address his competence for hearing the cases.

From the UNCRC, articles 3 and 12 are also mentioned, although less frequently. Article 3 indicates that the best interests of the child have to be considered by every actor and institution dealing with children as well as stating that protection and care of the child must include the role of responsible adults such as parents or legal guardians. Finally this article declares that the state should ensure that the institutions dedicated to children's care must conform to some standards of safety, health and appropriate supervision. This article is clearly related to the duties of the protection and justice systems, but the rules of the Convention did not result

in changes in practices. The best interests of the child have been difficult to define and put in practice, not only in Chile, even before the implementation of the UNCRC. These interests or standards are not defined in Chilean legislation and therefore the concept is used in a very vague way. This problem is not exclusive to Chile or something new. Authors such as Walton (1976) analysed the situation of social services in charge of children's welfare in the UK in the 1970s, finding that the expression "best interests of the child" has been overused and is usually understood as an equivalent to having achieved protection of those interests when discussing children's care. This author also argues that the expression has lost its meaning and it is difficult to debate about it in policy settings because nobody wants to be against the best interests of the child, and this is particularly important because any criticism of decisions tends to be neutralised if the decision is made in the name of 'the best interests of the child' (Walton, 1976: 308). In the cases analysed here, the rhetoric use of the best interest of the child has been used lightly and does not correspond to the reality of the measures used to treat adolescents. The use of this argument is also contradictory when is used to justify custodial measures (see Carlow 1986 for an analysis of use of custody in the best interest of children in the US). In the following example, the judge includes article 3 of the UNCRC as one of his supporting arguments to decide that the adolescent should spend a year in a rehabilitation centre where he will be deprived of his liberty:

Considering the psycho-social report and articles 1, 18, 29 no.3, 30 no.2 of the Minors Act, and articles 1, 3 and 12 from the UNCRC, it has been decided that: A protection measure is been adopted in favour of the minor. Entrust the minor to the care and responsibility of a residential drug rehabilitation centre for 12 months. The institution should look after him and inform this court about any situation that may be relevant. This measure could be extended if it is needed (Judicial file 2798).

Before the implementation of the Act on Adolescent's Penal Responsibility, judges were guided by the living circumstances of adolescents and children and attempted to provide care and protection even if that meant separating them from their families and communities. There were a low proportion of cases in which the only measure was to return the adolescent to their

parents (6% of the cases in GTZ dataset). This limited consideration of parents or other carers by the judges could be seen as an infringement to this article.

Article 12 of the UNCRC concerning the respect to the views of the child is pertinent to the discussion about discernment procedure. To some extent it can be said that adolescents were heard, which happened especially when the psycho-social report was made. There is also evidence of statements given by adolescents in front of the judge in the judicial files analysed here. There are signs that this aspect worked better in the minors' courts than it does under the new Act. In a study carried out by Muñoz in 2008, adolescents that had gone through trials in both the previous and current systems were of the opinion that under the Minors' Act they at least had their circumstances listened to, while now the different actors seem hostile to listening and considering what they would like to say⁸⁰ (Muñoz, 2008: 34-35). But this was not always like that, one of the experts interviewed for this thesis gave a very different account of the features of the procedure in the 1980s when legal aid was not available and commented on how intimidating appearing before the judge could have been and how this started to change gradually:

When the kids had the possibility of looking at the clerk in the court and saying "I appeal" they were making the world stop, everybody was paralysed and looked with a face like saying "what are you saying?" The kids were afraid, they were very scared because the relationship with the courts has always been authoritarian; it was always hands behind your back and head down agreeing to everything. So we used to do role play exercises setting them as in court: we had a character acting as a very nasty court clerk, very aggressive, threatening and belittling and we encouraged kids to talk to them so they could overcome their fear and exercise their rights (Charity director).

⁸⁰ These quotes of interviews carried out by Muñoz (2008: 34) are illustrative of the feelings that the changes have brought respect being heard in court: *"I don't know... they used to ask you questions, if you had problems with drugs, if we were drugged, if you had problems in your family. Then they asked you if we were sober, with drugs or drunk and there was a conversation with a psychologist and a social worker"* (Male, deprived of his liberty). Another adolescent adds that people mistrusts them: *"They just don't believe anything we say, before they believed what minors said, now they don't care, they just sentencing you"* (male under a precautionary measure).

Articles from the Minors Act have also been used as justifications for decisions by judges. These articles include articles 1 and 18 which state that the judge has responsibilities including:

- deciding about the future of the minor,
- knowing about all matters in which the minors are accused of committing a crime or offence, and
- deciding about their discernment ability and to apply the measures that the Act establishes when they are judged as not able to discern (article 26).

The judges also quoted article 28, which establishes that the judge will take into consideration the suggestions of a technical team (psychologists and social workers) in order to decide about discernment. Article 29 lists the measures that are available to the judge, but does not provide details about how these should be implemented⁸¹. Articles 34, 36 and 37 deal with the way that the minors' courts should deal with the cases of adolescents accused of offending and establish that "minors will not need legal representatives to appear before the judge" (article 36). This last aspect was important as the minors were unable to challenge custodial measures that were commonly used during the time that took to produce the psycho-social reports. Only in the 1980s a charity (Hogar de Cristo) started to offer legal aid to adolescents deprived of liberty.

Although article 32 states that the judge should establish the circumstances in which an alleged offence was carried out and the level of participation of

⁸¹ The measures available were:

1. A verbal warning and hand the minor over his parents or other adult in charge of his care
2. Supervised release
3. Entrust the minor to special institutions of education for the time considered necessary by the judge
4. Entrust the minor to a person who is able to direct the minor's education

These measures will last as long as the judge determines who could revoke them or modify them if circumstances change.

the young person in the offence, it also rules out the need to know the facts as it states that “however, even when the conclusion is that the offence has not been committed or that the minor has not participated, the judge may apply the protection measures that this Act considers provided that the minor is in material or moral danger”.

Situation after youth justice reform

In terms of the justice procedure the most evident change introduced by the Act on Adolescents' Penal Responsibility is the separation of protection and penal aims expressed by the abolition of the discernment procedure and the incorporation of young people between 14 and 16 years old to all the guarantees of the due process enjoyed by adults. The Act was conceived in procedural terms as an appendix of the adults' penal procedure which was implemented in Chile during the early 2000s. This implies the appearance of new actors and institutions dealing with young people accused of offending. First of all, the minors' court was abolished and replaced by new family courts (2005) which now deal with protection issues and other civil matters related to the family while criminal courts are in charge of cases of offending (supervisory courts and oral criminal courts depending on the stage and seriousness of the offence).

This section describes the new procedure based on the analysis of judicial files provided by the Public Prosecutor Office and the accounts of supervisory and crime judges. As I have mentioned before, the quality of the data from judicial files for this period is not consistent and therefore statistical comparative analysis was not feasible. Also the characteristics of the new trials and the interests of public prosecutors shaped the contents of the new sample making them in some way less rich than the files for the pre-reform period. Nevertheless, this part maintains the structure of the previous section, starting with the contents of police reports and discussing the outcomes of the procedure.

Contact with the police

The contents of police reports do not vary significantly with the implementation of the Act. According to other studies, the attitude of the police in relation to young people has not changed either and police abuse seems to be common and, at the same time, hidden from the public eye. Human Rights reports published yearly since 2003 by Universidad Diego Portales have shown that police abuse is commonly spread and especially prominent in the case of adolescents, although these practices have diminished since 1990 and a sharper decline has been observed since 2000 when the reform to the penal procedure was implemented due to introducing more instances of control of procedures⁸². These annual reports have found that the characteristics of the abuse have changed from being predominantly corporal to the use of psychological violence.

Berríos (2006) argues that one of the reasons for the occurrence of more acts of abuse towards young people could be related to the emphasis on formal application of the law without giving enough consideration to the rights implied in the law (Berríos, 2006: 141) and proposes strengthening mechanisms that allow control of the police behaviour.

In the current Act the rules for the detention of adolescents are established in article 31. This article establishes that arrangements should be made so the adolescent is seen by the supervisory judge (who is in charge of checking the lawfulness of the detention) as soon as possible (within 24 hours) and the hearing (detention control hearing) should be scheduled with high priority to accomplish this purpose. Also the adolescent could give testimony before the prosecutor only if his or her defence lawyer is present at the moment of doing so. About this last topic Berríos (2006) emphasises that this limits one

⁸² The reform to the penal procedure was implemented gradually across the country, starting in 2000 in areas relatively less populated until reaching the metropolitan area in 2005. The new Penal Procedure Code introduced more instances of control that have been considered a reason for decline on physical violence by the police (see Informe anual sobre derechos humanos 2005 and Berríos 2006).

of the motivations that the police had at committing abuses as any statement given without the presence of the defence will lack value in court. Finally, the article states that detaining a person who is clearly underage in places different to the ones authorised by the law will be considered a serious disciplinary infraction and will be sanctioned accordingly.

Introducing these rules is a first step towards controlling how the police work and they go in the direction of safeguarding the principle of deprivation of liberty for the shortest time possible. The time between the arrest and the preliminary hearing can be checked if needed as the time is recorded in every early communication between the actors involved. For example, in the case 6698-08 the arrest was carried out at 21.30 PM, at 22.11 the prosecutor talks to the police officer to request the separation of the adolescent from adults, at 22.30 the adolescent is seen by a doctor to check possible injuries and at 23.30 the report is completed at the police station and the adolescent is transferred to a minors' police station. Next day at 8.00 AM the defence is given notice of the detention⁸³ and the hearing is carried out at 12.00 PM.

This time keeping is important for several reasons. First gives evidence to evaluate, in part, if the detention has been unreasonably extended using arbitrary criteria. Apart from being able to check that the time of detention was within the limit, it gives clues to evaluate if the detention was prolonged in order to accomplish aims not permitted at this stage such as carrying out proceedings that have not been authorised as the investigation is not open yet or if the time was used to put pressure on the detainee in order to obtain a pre-judicial statement (Berríos, 2006: 143-144). If we take into account that after arresting someone he or she has to be put front of the supervisory judge in a timely manner, it becomes clear that any delay ruins that objective and endangers the protection of other rights just at a moment in which the person is highly vulnerable.

⁸³ According to the Penal Procedure Code, the prosecutor has to inform the defence about the detention at the moment of deciding to start the prosecution (article 131 no. 3 of the Penal Procedure Code).

There are not many studies about the behaviour of the police in respect to young people after the implementation of the Act on Adolescents' Penal Responsibility, but the few available are consistent with the observations made in the past. For example, Muñoz (2008), interviewed a group of students who were arrested because of public disorder during a series of protests occurred during 2007 and early 2008. The students manifested feelings of fear and helplessness with respect to police behaviour. During protests in Chile it is very common the use of teargas and water-cannons against protesters, which has been seen as disproportionate to control a group of teenagers in school uniform. The reasons for detention were weak⁸⁴ and arguably illegal according to some lawyers, mainly the reasons of arrest is simply because participating in the protests (Universidad Diego Portales, 2009). The vast majority of the detainees had been released after identity checks and the police have requested that their parents have to pick them up from the police station even though this requirement was abolished in 2002 and many students complained about being beaten up and verbally abused by the police (Universidad Diego Portales, 2009: 322). More recently a journalist's report (Matus, 2012) covered the subject, exposing serious cases of police abuse, including torture and illegal detentions, an academic quoted in that report stated that:

It is well known that the police have resorted to practices of informal detention of minors. They take them around in police vans, smacked them in the head or give them a kick when they deal with minor offences that they prefer not to take to court. These practices are tolerated and culturally accepted in some sectors of the police. (Couso in Matus 2012)

Matus also interviewed several adolescents that claimed they had been beaten at the time of the arrest and afterwards. Some testimonies are shocking and coincide with the definition of torture⁸⁵ including beating, tie

⁸⁴ Muñoz quotes a student who was arrested stating that "they arrested me because I was running away, what else can we do rather than run when the water-cannon is coming along with 20 guys running behind you ready to hit you with a stick? I couldn't just stand there" (Muñoz, 2008: 39).

⁸⁵ The UN Convention against torture and other cruel, inhuman or degrading treatment or punishment (1985) defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any

from hands and feet, sleep deprivation, withholding water or food while in detention and threatening with using electricity on genitals. Those testimonies match the findings of Jiménez's study from 2000 where her interviewees described having suffered similar mistreatment. Defence lawyers have argued that the medical report requested by law is not always useful as many times the examination is too superficial, not carried out at all or the police commit the abuses after the medical report is produced. Although the elimination of pre-judicial statements as valid means of proof could have had some influence on the extent of police abuse in the past, the adolescents interviewed by Matus mentioned that the police tried to force them to give away names of other possible offenders or some kind of information that could help their investigations and this provides renewed reasons for abuse.

Police reports after the implementation of the Act are very similar to the ones from the previous stage. They contain information about the arrest (time, officers involved, police unit where the report was written), the offence (type of offence, place, time, use of weapons), and about the detainee. The report records the name, address and ID, date of birth, gender and age of the detainee as well as injuries and their seriousness. It also includes a section where contact with a responsible adult to tell them about the arrest has to be recorded, and if they do not contact a responsible adult, the reason has to be given. The main part of the report also lists a series of documents annexed to it. Examples of supporting documents includes victims' statements, declaration of ownership of stolen goods, form stating that detainee's rights were read, medical report of injuries and, sets of photographs of elements that can be used as evidence.

The report contains in all cases a paragraph stating that *"the minor was kept separated from adults from the moment of transporting him and was kept*

reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (article 1).

apart from adults while in this unit as well". The times of arrest and arrival to the police unit are also recorded. Reporting the separation of children and adults correspond with the prosecutor's order to separate them which has to be documented according to the law. In this document the prosecutor informs the police of this legal obligation⁸⁶.

The wording of the police report is the same as before, which indicates that the claims for the police to change their relationship and treatment of young people has not reached this formal register of police action. As we saw at the beginning of this sub-section, there is evidence suggesting that police abuse has not diminished and will remain difficult to prove in the cases when is reported.

Characteristics of the trial and outcomes of the process

As the files analysed here come from the public prosecutor, there are some documents in the files that help the prosecutor to assess how "dangerous to the public" the detainee is. A complete list of previous contact with the judicial system (either as a victim, accused or convicted) in which the adolescent has been involved with is provided and the notes of the prosecutor show that this is taken into consideration at the moment of requesting a particular sentence.

The Act on Adolescents' Penal Responsibility works as part of the criminal justice system, including all the due process elements from the Penal Procedure Code. This is reflected in the new elements found in judicial files for example when the public prosecutor has to document that he or she has been in contact with the public defence to inform them about the arrest of the adolescent, so they can provide them with a lawyer.

⁸⁶ The document reads like this: *"Dated August 7th 2009 at 10.00 PM the officer XX from the police unit YY is requested that the minor ZZ is separated from adults at the police unit, during transport to health centres, to courts or any other transport at all times"*.

Because the procedure changed from being inquisitorial to accusatory, the files contain far less documentation about every step of the procedure. The trials are not transcribed but recorded, although a summary document which describes very briefly who was present and what was discussed during the hearing is provided. In that document every person involved is identified, the date, time and place are written down as well as the length of the hearing (the majority of hearings in the files are between 5 to 30 minutes in length). The outcomes will vary depending on the type of hearing and the stage of the case. For example, for preliminary hearings, the outcomes consist of providing a date for the next appearance before the court and the decision about the type of trial that will be carried out (which in general is the type of trial or proceeding requested by the prosecutor). In this hearing the judge also decides the type of measure that will be applied between the hearing and the next proceeding (liberty, custodial measure or other).

The file also contains a standard minute to be used at hearings by the public prosecutor. This minute includes basic information about the accused and the case and a list of possible outcomes that the prosecutor could request from the judge, such as:

- Continue with the prosecution;
- Request a simplified proceeding;
- Request a proceeding dealing with minor offences that can be subject to fines (procedimiento monitorio);
- A simplified proceeding (for cases with a low level of complexity to be decided in the guarantees' court when the prosecutor requests a sentence up to 301 days of prison);
- Use the opportunity principle (the prosecutor can decide not to prosecute or suspend prosecution when the offence does not compromise the public interest);
- Diversionary procedures (this refers to restorative measures)

- Conditional suspension of proceedings (agreement between prosecutor and accused where the prosecutor suspends the investigation if the accused agrees to certain conditions that should be approved by the guarantees' judge);
- Request an immediate trial.

The minute also can include observations or information relevant to support the outcome sought by the prosecutor. In this part they mention if the accused has appeared before a court in the past, if they were subjected to precautionary measures and any current or past convictions.

Prosecutors' minutes often show the strategy for negotiation with the defence. For example, in the case of motor vehicle theft the prosecutor states that he will request a simplified proceeding for all of the accused involved, mentioning that the defence lawyer would agree in principle to this. Also it shows that in the case of the adolescent, the prosecutor will ask for 3 years of probation⁸⁷ but if the adolescent recognises his participation in the offence he will drop the time to 1 year. In this case a simplified procedure was accepted and resulted on the sentence that the prosecutor had planned previously (judicial file 124-08).

If a simplified proceeding is decided, there will be only one court appearance where the responsibility for the offence is admitted and a sentence is pronounced. The document in which this hearing is registered does not provide the legal arguments to be considered in order to justify the sentence, as was the norm for the pre-reform period, although for serious offences

⁸⁷ This measure is not strictly parole as known in the UK. In the Act on Adolescents' Penal Responsibility the exact term can be translated as "assisted liberty" and consists of giving the adolescent a series of tasks to carry out under the supervision of a "assisted liberty delegate", these tasks should be in line with the aims of responsabilisation and social reintegration stated in the law and usually include measures towards resume school attendance or holding a job, periodic interviews, and family involvement in order to support the achievement of the goals established in the "personal intervention plan" designed for the adolescent.

there are more supporting documents (from the court and about investigative procedures) in the file.

In general terms, trials under the Act follow the procedures established in the Penal Code, but there are some specific rules for adolescents. Among these rules, specialisation of actors was a highly debated topic during the discussion of the Act. Several experts have argued about the importance of having a specialised system in order to make clear that despite admitting that adolescents are responsible for their crimes, dealing with them in the criminal justice system is considerably different to dealing with adults as adolescents are people in development and they hold specific rights which make necessary specialised procedures and laws (See for example, Cillero 2005, Maldonado 2006 and Duce 2010). At a practical level, specialisation would help to accomplish some of the goals stated in current legislation and would allow to diminish situations that could mean inequality before the law (cases where depending on the knowledge of the actors, the outcomes of the process can be taken considering some circumstances and rights into or not). One judge from the criminal court explains how different views and knowledge among the judges can impact on the outcomes of the trials:

Many judges make fun of me, they say “here he comes, uncle [name of the judge] will start to ask the kids about this and that”, then you think, because all the judges have to take cases of adolescents, but not everybody has the same sensitivity to deal with them, to see if the sentence that they want to use is what the kid needs to make him aware of norms that will help him integrate in society reasonably well (Judiciary and institutions of justice 5).

The requirement that specialised actors deal with cases where adolescents are involved is partial as the Act states that “any prosecutor, defence lawyer or judge competent to know criminal cases is enabled to intervene, if, exceptionally, the distribution of workload make this necessary” (article 29) which in practice means that, due to the pressure for accomplishing targets of efficiency, specialisation is almost optional and actors receive limited training about how the Act works and about the characteristics of adolescents. Only the defence has developed a way of working in which

specialised lawyers take mainly adolescents' cases. The following quote from one supervisory judge explains what happens in practice:

Apart from defence lawyers specialised on young people cases, all the rest of us work with adults, in a system designed for adults, I mean, minors don't have a special system, they have a special law that establishes different sanctions. All the aspects of the procedure, apart from some exceptions, are the same (...). We are not used to work in that way [a way that suits young people] and if we have prosecutors that arrive to the hearing and only there and then they have a look at the file of the case, a file that someone gave them minutes before, and they have to start to think about how an adult's sentence translate into a sentence for adolescents in that moment... I can tell you that sometimes they request 541 days of prison in its minimum degree of special assisted liberty [a sentence that does not exist], because they just don't know, I mean they don't even know how to translate it, you know?, they don't disconnect from the adults' system (Judiciary and institutions of justice 6).

Sentencing depends mainly on the public prosecutor's criteria. The prosecutor usually negotiates with the defence which sentence will be applied while the judge has to agree or challenge the requests. In practice the process goes ahead in a standardised form that is based on the offence rather than in the complexity of the cases. In the supervisory court it works like this according to a judge:

In practice (...) the public prosecutor has created, well not just the public prosecutor but the actors as a whole have created a sort of informal catalogue of mandatory sentences, so you see that for this offence it will be prison, for that a simplified proceeding, for this one the proceedings will be suspended, is almost like a mathematical table of penalties that does not allow any kind of analysis of the contents. There is not discussion why we are going to ask for community work, we don't know if it is likely that this will help with the responsabilisation for example. In the cases I have seen since the implementation of the Act nobody never, never, has required an accessory measure of drug rehabilitation, that in theory was "the" tool for prevention... and this is not because the kids don't have problems with drugs (Judiciary and institutions of justice 7).

This way of negotiating outcomes is confirmed by another judge who also argues about the lack of reflexion at the moment of requesting a sentence:

What they do [the defence] is talking to the prosecutor to agree in which degree of seriousness the case will be (...). And I can tell you that there are standard sentences, for example, violent robberies and burglaries get

assisted liberty [probation], if the kids have committed other offences in the past, it increases to special assisted liberty [a stricter form of probation], handling stolen goods gets community service, I mean... you tell me an offence and I can tell you what sentence it gets. Hypothetically this should be the other way around, I see the offender and then decide what sentence is more suitable... here you have youngsters that are 17 and nine months old and are forced to serve an assisted liberty for three years when they are already working and have one or two kids (Judiciary and institutions of justice 7).

The defence works under the principles of minimising the possible sentence for the adolescent and opposes any kind of additional measures even if other actors consider that is the best way to deal with the case. The idea behind this attitude is related to the role that the criminal justice system should have in the view of the defence, they are not there to deal with problems that other parts of the state or society should be caring for and they resist firmly the idea of using the system to solve, for example, issues like drug addiction if that means that the adolescents will be deprived of liberty in a rehabilitation centre. This position was mentioned by other actors in the interviews and was confirmed when talking directly to a representative of the defence who stated that:

This discourse that emphasises socialisation aspects is risky because helps to justify penal intervention when you are not in doubt, I mean, you could say, I am not completely sure if this youth is guilty but he has so many needs and assisted liberty is so good-at least in paper- that let's intervene! Therefore we always....it's not that we are against, we are in favour of preventive measures, but our interest has highlighted that you cannot base that on punishment. If there is no offence and there are many social needs we should use the social care system, but the criminal system unfortunately...I mean, it's not that we are insensitive, but we are not here to do that and that is perverting the system (Judiciary and institutions of justice 1)

Also, the approach to the case varies depending on the social origin of adolescents and the perceived chances of amending their behaviour. This again brings to mind the tension around extra-legal elements in the criminal system. One supervisory judge describes what she has seen in her court:

In practice, the public prosecutor, in my view, when dealing with children from "good" families in certain cases they don't use the same criteria than in

cases of adolescents that present risk factors. In some form the logic of discerning-non discerning is still in use but in a more informal way as the decision to continue with the investigation is under the prosecutor faculties (Judiciary and institutions of justice 7).

As an example she mentions that:

having car races in the Costanera [road that runs by river Mapocho], and things like that, which involve clearly dangerous behaviour but the prosecutor, because the kids are from well-off origins, where they are more protected and have a private lawyer, these adolescents are offered conditions that are not close to what is offered to other kids who have committed minor offences, sometimes out of need, like going into a supermarket and shoplifting food, they get more strict sentences. The prosecutors are using the logic that the middle-class boy won't be in trouble again, that will learn from the experience and his family will do something. For the other ones the way is prosecution because they won't change anyway.

As the Act requires that every sentence is accompanied by a personalised plan of intervention which should be orientated to the objectives of responsabilisation and social reintegration stated in the law, a new hearing (intervention plan hearing) in which the judge reviews that plan is scheduled.

The intervention plan hearing is attended by the offender, the defence lawyer, the prosecutor and representatives from the organisation that will carry out the plan. The judge approves or rejects the plan in this hearing and also establishes the frequency in which he or she will require advance reports about the development of the plan. Despite the emphasis given to the need to stick to the personal circumstances of the adolescent when developing a plan of intervention, it could be observed in the files that plans are rather standardised and activities are not necessarily in harmony with the problem that is claimed to be addressed.

An intervention plan contains a summary of diagnosis of the adolescent's circumstances and a brief description of what he or she is doing at the moment of creating the plan (for example, if he has gone back to school,

training or work). Protective and risk factors could be reported in the plan as well.

The possible explanations for the standardisation of these plans can be found in the law, which does not provide enough guidance in respect to the means to achieve the ambitious aims of the law. In practice, the judges interviewed for this thesis argued that there is a lack of space to discuss how appropriate the sentences are and because pre-sentence reports are not in use they do not know anything about the adolescent. This lack of consideration of offenders' personal characteristics would have both good and problematic results. On the one hand, actors consider that this is a form to avoid the temptation to use welfarist criteria when sentencing. In the other hand, not knowing about the personal circumstances of the adolescent could lead to use measures that may affect their lives in unintentional ways, for example, making them go to a reintegration centre at times where they are at school, which would harm their right to education. Some of the judges interviewed consider that this could be in part amended by talking to the people that will be in charge of carrying out the sentence so they could tell them if their decisions are in conflict with important aspects of the adolescents' lives. About the tension between protection and justice one judge from the crime court stated that:

the fear of going back to use protection aims is there, I mean, I think it depends of each judge, but without doubt the report [that comes with the intervention plan] is merely part of the mechanics of the procedure. And each time you see when you review them that are strangely the same, they are all standardised, eh, the same, almost the same in each one (...) so these reports are quite deficient, I think they are too superficial, maybe because they don't have time to make them...I don't know (...). In the hearings there is not much analysis of the plan either, I mean, it's incredible, you can get to the hearing and some colleagues don't even... I mean the hearings usually consist of verifying if people involved are in the courtroom, seeing if the report is ready, asking the defence and prosecution if they have seen the report, to which they answer "yes magistrate", I ask if there is any objection to the plan, they say "no" and then it gets approved. And the next is the same, over and over again (Judiciary and institutions of justice 5).

Another problematic issue is that the organisations in charge of carrying out the programmes apply mechanically the “Technical orientations” created by the National Minors Service in which even a template to record the aims and results of the intervention is provided. One supervisory judge explains further this:

I used to get very annoyed with the delegates because they showed the same plan for everybody, but do they have another option? At the end of the day they get the full package [they have to do what they are told in court which is product of the negotiation between defence and prosecution and in practice they have to follow the guidelines from the National Minors Service] you have to develop a programme of community work, even if the adolescent has 250 hours of work undone, anyway 30 extra hours are added (Judiciary and institutions of justice 7).

Another judge suggests that there is also a significant gap between the contents of the report and the reality in which the activities proposed are going to be developed:

[The person in charge of the measure will tell you] we are proposing to work on this and that with him” but when you compare what they say to the social evaluation, that the same team has provided, where they tell you that the kid is illiterate, that smokes crack, that has a very informal job, like looking after cars in the street...because that’s the kind of person that you get here, those are the ones that get convicted, but they set objectives that are made for a middle class kid that has completed school [...] what they do is just complying with their obligation to inform the court about what they are going to do, but is full of ambiguity (Judiciary and institutions of justice 6).

This section looked into the features of the procedure and the outcomes of the process after the implementation of the Act on Adolescents’ Penal Responsibility. To summarise I would like to highlight two aspects: the diminished discretion of the judge and the high level of standardisation of the interventions plans that shape how sentences are carried out in practice.

Diminishing judge’s discretion was one of the overall aims of the Act before the previous situation where the total discretion of minors’ judges put adolescents at considerable disadvantage before the law. Some tension has arisen when discussing the extent of this lack of discretion. The power to

decide about the results of process moved from judges to prosecutors, who have created a sort of catalogue of penalties which appear to be even less flexible than the one established in the Act. Actors of the system have criticised this and the fact that the decision making process works without discussion or reflection for the majority of cases.

In a setting where the choice of sentences has been reduced, the details about the execution of the sentences also have become standardised. Some actors insist that the lack of consideration of adolescents' circumstances is preventing the system from carrying out its aims of social reintegration. The lack of flexibility in sentencing and execution could be explained in part by the contradictory aims of the law. Having the aims of punishment and rehabilitation or integration simultaneously in the law is not something exclusive of the youth justice system, and this can also be observed in legislation concerning adults (in fact, the rules for choosing a sentence in the Act are directly linked to the adults' Penal Code) but here the tension appears to be strong because of the fear of repeating the practices of the past, i.e., considering *just* social circumstances as justification of decisions. The problem with this approach is that prejudice can go unchallenged causing inequality before the law, as it was exposed by some judges when talking about the approach that the prosecution take when, exceptionally, middle class adolescents are accused of committing an offence.

Closing remarks

This chapter reviewed how the way of dealing with young offenders has worked before and after the implementation of the Act on Adolescents' Penal Responsibility. In order to accomplish this, a range of data sources were reviewed, including the literature, data from judicial cases and interviews with experts, policy officers and judges. Despite having used this relatively broad scope of sources, there are aspects that will remain difficult to explore because of the settings in which they are developed, like the actual

behaviour of the police or the circumstances in which sentences are put in practice. These aspects could be addressed in future research using non-participant observation methods.

For the procedures in place before the implementation of the current Act the most serious issue was how basic rights supposedly guaranteed by the Chilean political constitution and international treaties were systematically infringed. For a start, in the minors' court the decisions made were not related to determining innocence or guilt even though the starting point of the procedure was related to offending. In fact the actual offence was not even proved to happen because the protection system was defined as totally separated from the criminal system.

There were at least three trends that influenced the tutelary system:

- humanitarian views that were concerned about the way of treating children in the criminal justice system who maintained pressure for a change to a differentiated system⁸⁸;
- a positivist approach which defines crime as a pathological condition which can be treated by the means of punishment, and;
- reformatory ideas that promoted the creation of an alternative way of dealing with young offenders outside the penal system and that considered the measures taken in such a system would have educational aims and protect children. Their premise was that there would not be space for mistreatment or abuses in such a system as the measures would be intrinsically "good" for children.

According to Cillero and Bernales (2002), the core problem the tutelary regime presented was that it denied or ignored the punitive character of the system and its ways of responding to conflicts (mainly institutionalisation of children and young people). As it was assumed that measures were

⁸⁸ For a detailed account of this trend in the US and its influence in the implementation of the first Juvenile Court see: *The child savers: the invention of delinquency* by Anthony Platt (1969).

protecting children, the need for regulating how and how long these measures would be carried out was omitted, resulting in a situation where children ended having less guarantees than adults in the criminal system (Cillero and Bernales, 2002: 20). Thus, the good intentions in which the tutelary regime was based on transmuted in putting children and adolescents at a disadvantage⁸⁹. In Chile the system worked based on the separation between adolescents that could be saved from a life of crime and the ones that could not be saved. This separation of cases depended on the results of the discernment procedure where the ability of guilt was determined. In theory this ability would depend on the biological development of self-determination capacity of the adolescents. In practice, as it was shown in this chapter, the distinction between discerning and not-discerning depended on how socially and psychologically damaged a young person was. Its logic was that the most troubled adolescents could not be saved and, therefore, the protection system was closed for them. These adolescents ended in the adults' criminal system, in which there were very small differences between the treatment of those under 18 and over 18. The ones who were seen as salvageable were treated under the protection system. Unfortunately for them this did not mean that this protection was effective or that measures differed significantly from the ones used for discerning adolescents, for example, in the case of use of deprivation of liberty.

The Minors' Act of 1967 allowed a wide use of deprivation of liberty for both offenders and children and adolescents in need of protection. Under the Minors' Act it was possible to use some extremely punitive measures in detention centres, which is a good example of one law allowing something that another law simultaneously prohibits (in particular after signing the UNCRC in 1990). Examples of this were the wide use of solitary confinement as routine practice and denying family visits as a form of punishment. Both

⁸⁹ Platt questions the good intentions behind the compassionate views of "child-savers" in the case of the US. If we make a parallel with the situation in Latin America his observations can be applied to the "irregular circumstances doctrine" which shared characteristics like dealing with young people in an informal way which can be seen as the state exercising its control over young people deemed as problematic before they committed an offence in the name of the best interest of children (see Platt Bergerand and Gregory, 2009: 4-5 and Platt 1969).

practices are in clear infringement of the UNCRC and the UN Rules for the Protection of Juveniles Deprived of their Liberty.

This was highlighted in 2002 by the UNICEF Committee for Children Rights which *“notes with concern that detention is not used as a last resort, especially in the case of children who are poor and socially disadvantaged, and that often children are detained in detention centres for adults”* (Concluding observations of the Committee on the Rights of the Child, Chile, 2002: 14). It also recommends that the country should *“Establish two clearly separated systems (in terms of administration and implementation) for children in need of care and protection and for children in conflict with the law, by adopting the two draft bills, one on the protection of children who need assistance and the other on children in conflict with the law”* (p. 8).

There was broad consensus that both the approach and the practice were inadequate under the tutelary regime. The requirement to adapt local legislation to the precepts of the UNCRC and improve everyday living conditions and treatment for young people deprived of liberty, along with the need to show that the perceived increased of youth crime and violence was being tackled, propelled the changes to the system. Probably the most significant change was the incorporation of young offenders to the rules of the due process establishing the age limits for criminal responsibility which eliminated the discernment procedure definitely.

Among the challenging aspects analysed here, police behaviour can be considered one of the most problematic. The police records analysed here only show a part of the story, in which everybody behaves according to the law. The reform to the criminal procedure involved putting in place measures to minimise police abuse, for example, including formal steps that the police must register and share with other actors of the system, like recording that the detainees are aware of their rights or affirming that separation between adolescents and adults during detention and custody has been effectively

carried out. Unfortunately, these formal steps and the apparently law obedient behaviour does not fit reality as there are reports of serious cases of police abuse and most of these do not even get investigated.

Other problems observed in the implementation of the Act are: the goals and aims of the Act do not fit with the practice; there is lack of understanding of adolescents' characteristics which undermines the ideas of differentiated treatment for adolescents in the criminal justice system and has an impact in sentencing; difficulties originating from the lack of specialisation of actors; and problems in the elaboration of intervention plans which impact on the execution of sentences.

The objectives and aims of the law are broad and contradictory, and the lack of resources and organisations' resistance to change mean that at the level of direct intervention results are perceived as not satisfactory by the actors involved.

The technical rules of the National Minors' Service go in this direction (...) they are so broad and so ambitious! In essence, they want a "new man" [as a result of their intervention] and they don't realise that the basic issue here is that the kid doesn't die in jail, and if it's possible to avoid criminogenic contamination from other kids too. If they could do that, we will be on the other side, only then maybe we can cover things like education, mental health, etc. (Policy makers and policy officers 1).

The lack of specialisation, apart from causing the problems related to the way in which actors deal with the cases in the courtroom, as was shown earlier in this chapter, also has an impact on the general function of the system as a whole, as one supervisory judge comments:

[The ones that should be specialised are especially judges and prosecutors] who are in control of the flow between offer and demand in the system, I mean, while the public prosecutor office keeps insisting on prosecuting kids because they steal chocolates from the supermarket, or are shoplifting trainers and hats... how can you work with that level of... I don't want to say lack of judgement, because they have a legal base to do that, but the problem is that doing that is a complete abandonment of the minimal criminal intervention principle that the law contains and of the treaties that are on the base of the law (Judiciary and institutions of justice 6).

At the same time, the lack of specialisation is mirrored by a lack of empathy about the situation that adolescents face before the criminal procedure. The language used in court is not understood by adolescents and it seems that there is not enough effort to improve this and ensure that the adolescents' views are heard in this important setting even though this aspect was included in the Act (article 49 about rights in the implementation of sanctions). Evidence of this can be found in Muñoz (2008) where adolescents interviewed by the author insist that nobody pays attention to what they would like to say and they are labelled as threat to society during the procedure. One judge from the criminal court confirms that this happens and reflects on the consequences of these problems:

I was talking to defence lawyers that my feeling, and the feeling of many judges, is that adolescents don't understand a thing in the hearings and procedures (...). When I used to visit prisons the kids always asked me "do you know when I am going back to the court?" and I just answered that I don't know, I have no idea, you have a lawyer and he must have told you if you have to go back to court and they said "no, the gentleman that they put by my side in court was wearing a tie and everything but I don't know what he was talking about" (...). We keep talking in a very cryptic language, despite being now an oral system; we use a cryptic language where nobody understands anything, apart from the prosecutor, the defence and us. And that causes a big problem because it is not only the accused who doesn't understand, the victim, the public don't understand, journalists neither understand so we talk and have a shouting match where we say "article 124 linked to 123 and according to the faculties of the prosecution..." and nobody understands (Judiciary and institutions of justice 3).

As a whole the system works at hectic pace and there is no time to stop and think how actions and decisions taken by every actor will impact on the lives of young people. The ways in which decisions are taken have been set by the actors responding to the demands of the system and have become more inflexible than it was predicted:

It is a sausage machine, but here the result of the machine is that you go to jail [...] Penal law works with a level of automatism that is unbelievable, so much lack of reflexion, people... it is like a formal system of prosecution in which the formalities are there, supposedly, in order to guarantee that levels of discretion are low, because that is the aim, isn't it? Its aim is presenting

every conflict in the most objective way possible, not make them personal, but youth justice requires other elements (Academics and experts 1).

Chapter 7: Conclusions

The thesis documents the implementation of the Adolescents Penal Responsibility Act of 2007 in Chile. In this thesis I have explored the development of youth justice systems in developed countries, Latin America and Chile. I also did research on the approaches or responses to youth crime along with the main concepts used to describe and analyse youth crime and youth justice. I carried out a series of elite interviews and collected files of young people's judicial cases. I also analysed official documents, President's annual account speeches and the history of the Act which is a compilation of the Parliamentary debate of the Act.

I undertook those tasks in order to have an answer to my main research question that is:

- How the Chilean youth justice system has changed since the last reform?

With the purpose of delimiting this broad question, I stated these secondary questions:

- How and why reform to the youth justice system was considered necessary?
- What are the differences between criminal procedure in practice and the formal modifications made by law?
- Which ideas and beliefs about youth crime and society were behind the youth justice reform?

Research questions' answers and methodology

This work shows the elements of the reform that were successful, such as the introduction of a separate procedure in which the right to due process is guaranteed for young people. This is a significant change from the pre-

reform situation where the procedure and treatment for children in conflict with the penal law and children in need of protection and care were treated the same. Previously, adolescents were punished for their social conditions in an attempt to manage the risks of re-offending.

The thesis also shows the elements that were partially achieved by this reform. For instance, the actors and institutions that deal with young people have in general not gained the level of specialisation that was initially aimed for. Also, the amount of resources allocated to implement the Act was not sufficient to achieve its aims (a successful social reintegration of young offenders).

The thesis also documents that one of the most controversial sections of the Act was only added on a week before the implementation of the act, imposing mandatory custodial sentences of the most serious offences.

My thesis explains:

- What are the effects of international law on domestic legislation;
- How youth justice is carried out in Chile;
- How the system for dealing with young people accused of offending was reformed and who was involved in that process;
- What are the main beliefs about youth crime and how these influenced the reform process.

My thesis also explains the main triggers for this reform. There were two milestones that made the reform to the youth justice possible, not only in Chile but in Latin America more generally: the return to democracy and subscribing the UN Convention on the Rights of the Child.

The re-democratisation process brought internal and external pressure for legal reforms in many areas, including human rights and criminal law. The UN Convention made more people aware of the situation for young people involved in the justice system and changed the nature of the debate on this issue, making it clear that children have rights and there is a clear obligation for the states to protect those rights.

In exploring the implementation of the Act, my thesis shows that in a democracy, politicians have to ensure that public opinion is appeased while international agreements are kept to and there are times when these two aspects are not compatible. It is clear, from the analysis of the literature, that public opinion can be influenced strongly by the way that the media portrays crime.

This thesis documents the period from the first attempts to create a separate youth justice system until the implementation of the current Act. It shows that the reform process was shaped by two main groups of advocates, who held opposing views on many of the key issues.

There were many elements involved in the debate, from values and beliefs about childhood, rights and justice to practical problems that needed attention, such as living conditions in detention centres and how to deal with public opinion about youth crime. Empirical evidence was made available to help inform decisions, and experts were invited to contribute at key stages of the debate. Even though a range of experts gave advice and predicted some of the current problems they were not always listened to. The thesis shows that some expert advice was ignored.

My research shows that the reason for this was the prominence of the group that I classified as “citizens’ security advocates”. This group became increasingly prominent in the debate and played a fundamental role in taking

the reform away from its original aims and shaping it towards what has been described in the literature as penal populism. My study shows that this was helped by the political power and effective use of the media that this group had at their disposal.

Overall, my thesis contributes to the general understanding of the policy making process in a democracy and shows how stakeholders attempt to gain agreements in an unequal setting.

Interviews were carried out in order to obtain information about how the reform was planned and put in practice. Judicial case files were analysed to show the changes in legal procedures and outcomes of the system. Unfortunately, in this thesis, judicial cases could only be used partially because the information that they contain is insufficiently detailed for the purpose of comparing variables between the old and the new procedures⁹⁰. I found that the material in the files lacked clear and detailed information and was highly standardised, and this reflects some of the characteristics of the system described by key actors interviewed. An example of this was analysed in chapter 6, with the plans for intervention proposed to the judge by the state sponsored agencies in charge of carrying out those interventions. Despite this being the most important instance for developing a personalised plan (in order to accomplish the objectives of responsabilisation and education stated in the Act) those plans are generally the same for every type of case, and the practice is one of “copy and paste” into a template.

What did I learn about how to approach this type of study

As I explained in chapter 4, creating a case study about the youth justice reform process had as an objective to minimise the gaps in information encountered during my fieldwork. This thesis was first planned as a quantitative work looking at predicting outcomes in the Chilean youth justice

⁹⁰ In appendix C an example of judicial files for each period is provided.

system and identifying what led to those results. The lack of systematised data and problems of access to what is available led to a change of strategy. As a result of the lack of consistency in the data obtained, I only could carry out quantitative research to analyse the outcomes of the procedure for the period before to the implementation of the current Act.

Here I comment briefly about the limitations of the sources of information available and used in this thesis and the problems I found during the analysis of the data.

After realising that the judicial files for the period following the youth justice reform were not detailed enough to answer the questions I posed in my PhD proposal (about comparing both periods and find the legal reasoning behind the decisions of judges, prosecutors and defence lawyers) and did not allow comparison between periods, I had to think of different sources of information available. I decided to rely principally on interviews and official documents as they were more content rich than the available judicial files.

Using official documents brings up some issues that are worth mentioning. First of all, the possibility of bias in the documents has to be considered. It may be tempting to think that official documents accurately reflect the phenomenon under investigation precisely because of their official character. There are some necessary precautions that can be taken in order to avoid interpretations that may be misleading. For instance, we can ask ourselves in which way the documents can present bias. In order to answer this question Bryman (2008) recommends examining documents according to their context and the purposes and audience for which they were written. In other words "files never speak for themselves" and it is important to understand the format of the documents and the processes related to their construction (Silverman, 2001: 129). These possible biases apply in the case of this study to government reports about crime (including statistics), policy drafts and

judicial files of young people (which include several other documents from different institutions).

Statistical records are a good example of the increase awareness of researchers about limitations of data sources. Until the 1960s, official statistics were considered as an accurate representation of social reality without thinking deeply about the social production of the figures and the institutional uses of them. In the Chilean youth justice system (and criminal system in general) there are several differences in the figures depending on the institution that produce them and their own institutional aims. For example, the police emphasises the number of detentions without much detail on circumstances of the offences and age of offenders, leaving them in broad categories that do not fit the age limits specified in legislation by the law. In the same direction the Public Prosecutor Office is interested in the number of prosecutions and the kind of sentence given and their work is shaped by instructions or guidelines set by the National Prosecutor.

In the case of interviewing elites or key informants several authors have discussed the barriers to having access to them (Berry, 2002; Goldstein, 2002; Aberbach and Rockman, 2002) and I certainly found limitations in my study. While academic experts, policy makers, directors of non-governmental organisations and high level civil servants and members of the judiciary were in general happy to collaborate and showed interest in talking about what they know and think about youth justice, contacting politicians was impossible despite repeated attempts, with only one deputy responding to my request (and that was to decline to be interviewed). Fortunately, the views of politicians can be found in media interviews and for the case of the parliamentary debate of the Act on Adolescents' Penal Responsibility their views are reproduced in the official documents produced by the Parliament (Historia de la Ley 20084 and 20191).

My research process

My initial optimism was replaced by feelings of being overwhelmed and frustrated. I have learnt that is useful to have a good plan, but even when one thinks that things are well thought through, plans may not work as designed and not all the stages of the plan depend completely on oneself. After this experience I learnt how important it is to be flexible and always try to have an alternative plan. Another difficulty, that has more to do with the thinking process, is to know when to stop reading and looking for new material and when to stop analysing data (in particular qualitative data where there are many different approaches available). I think this problem may relate to the fact of being a student and not thinking in an authoritative way. There are always alternative ways of approaching your research that call your attention and there are always new and old developments in the literature to find. With the large number of ways to approach this, but with limited time and space to explore it in, I decided on the need to prioritise on what I felt were the most important issues that would benefit from full analysis. I am aware that this could lead to possible gaps in my understanding of the issue, but I felt that a detailed study of a small aspect of the reform would be more beneficial than superficial look at all possible parts of it.

Expanding the sources of data I found that a new and relevant question arose. It became clear (both from the data and the literature) that in order to understand the process I needed to pay attention to discovering which values and ideas of the different actors influenced the agendas of institutions, politicians and public opinion. The question of social characteristics impacting on the outcomes of the system was also related to this. In some way the gap between law in the books and law in practice (Nelken 1981) was similar to a gap between intentions and results, where the wish for social integration, holding young people responsible for their crimes and crime control do not meet a reality that is characterised by erratic

policies and the lack of appropriate services to accomplish those objectives. One of the key actors interviewed states about this issue that:

Always in matters related to childhood it seems that placing noble or superior aims is enough. It seems enough to state beautiful things there and there is always a huge gap between what legislation says and what is actually happening. I think that eliminating that gap is a public policy task. I think that one of the problems that we had to design a specialised system was that the number of young offenders is too small; it was not justifiable to spend so much in such a small group (Academics and experts 1/ Classified as children's rights advocate).

If there is no media scrutiny of a reform and its outcomes, it is notable that there is unlikely to be accountability for the government. The role of the opposition parties (of all political persuasions) is vital here, but in general they fail to engage with issues in detail to improve reality, and instead, they settle for scoring political points. The reality is that all parties in parliament had a role in a reform, in this case, for example, there was cross-party consensus on the general aims of youth justice reform but there was disagreement about the ways to make those aims possible. In the UK, parliamentary select committees, and independent inquiries can help to highlight reforms that have been ineffective in implementing the intended outcomes, but in Chile these are used in a much more limited context.

Findings

Pre-reform situation

Before the Act on Adolescents Penal Responsibility was enacted, punitive measures were disguised as forms of protection. There were many cases in which adolescents came into the system after being accused of committing an offence but the tutelary system did not consider it necessary to investigate the truth of the accusations. The contact young people had with the justice system was one of the ways in which the state could provide some kind of care to vulnerable children. Some have argued that there were many

similarities between the conditions in care and in prison. The discernment procedure was used to determine how “dangerous” a young offender was and to try to predict the likelihood of re-offending. This resulted in a process where the more vulnerable adolescents were also the most likely to be declared “with discernment” and sentenced as an adult. If the offence was not serious and the alleged offender was reasonably integrated into society by going to school and/or having a caring family, it was very likely for them to be considered “without discernment” and to be sent home with some kind of “protection” measure (for example, an order to attend school). The tutelary system worked in practice against logic, with the most damaged and vulnerable adolescents being given the hardest punishment available when one could argue that according to their abilities and situation it was less likely that they had a full understanding of the consequences of their actions. The system tended to focus on how likely was that the adolescents could be “saved” from a life of crime and separate these young people from the ones that were (in the view of the system) beyond help. I have used inverted commas for saved because the protection measures in closed institutions were in practice not so different from plain imprisonment but with a difference: protection measures were imposed for an indefinite time period.

Considering the situation of young offenders before the implementation of the new Act, one could think that any change aimed towards more consideration of children’s rights would improve the circumstances for adolescents. Therefore I found it surprising to find that adolescents who had passed through both systems actually missed the old way of doing things, mainly because previously the magistrates listened to them and they could use their social circumstances to get milder measures applied to them (see report by Muñoz 2008).

Reform of the system

The original objectives planned for reform, once Chile recovered democracy in 1990, were to incorporate the UN rules for treatment of children in the criminal justice system, creating a special justice system for adolescents, defining the age of criminal liability and to improve the conditions of young people in detention centres.

From my interviews I was able to identify two groups of advocates who were highly influential in the development of youth justice in Chile:

- Children's rights advocates
- Citizen's security advocates.

From my interviews I discovered that in practice the rights and justice approach put forward by the "children's rights advocates" was surpassed by a punitive approach, with a crime control emphasis supported by the group of "citizens security advocates" whose main motivation was to tackle (in their view), an alarming increase of youth crime and the concern about crime shown by the public in opinion polls.

From reviewing the literature, I found that the lack of theoretical constructs developed from and for the Latin American reality has been a recurrent topic in local social sciences. In case of law and criminology the scarcity of local ideas can be also observed. Since conquest by the Spaniards, law has been either the same or a variation of Spanish law. Something similar has happened to the forms of dealing with crime for which Latin American countries still import different ways of managing these problems. Del Olmo summarises this arguing that Latin American countries have *"blended the European 'juridical science' with North American 'techniques of treatment' "*

(1999: 24)⁹¹. For Sabatier and Weible, this situation is not confined to Latin America, as they state: “in developing countries, many [policy] subsystems are quite nascent because of the instability of the broader political system and the lack of trained personnel in the system” (2007: 193).

Both policy transfer elements and the lack of development of their own policies can be observed in the evolution of the Act as a policy. As I explained, during the military regime the situation for young people in the criminal system was left untouched with the exception of limited action by some groups from the civil society.

As with other newly-formed and newly recovered democracies in Latin America⁹², Chile even until the 2000s still conserved characteristics from previous periods, and have still to make several changes in order to improve the lives of their citizens, especially specially in case of vulnerable people. By 2003 Chile was among the Latin American countries (also in this group we can find Mexico, Colombia, Argentina and Uruguay) left behind in the adaptation of their legal systems to the precepts on the UNCRC and other international treaties.

Penal populist ideas have been widespread in the political field since the 1980s. Although harsher punishment is usually identified with right wing parties, who tend to be more openly in favour of punitive solutions and the depersonalisation of young offenders, in this case all of the political parties are influenced by punitive ideas to some extent. Penal populism is about winning public support by implementing policies to control crime.

⁹¹ See also Sozzo (2006) for an analysis of the Italian influence in Argentinian criminology and the place of translation and importation of ideas from Western countries towards Latin America.

⁹² Due to civil wars in EL Salvador and Guatemala and dictatorships in Chile, Argentina, Nicaragua, Panamá, Venezuela

For penal populism, it is difficult to establish cause and effect without detailed statistics. The question that could be asked is whether the citizens' security advocates influenced the public perception of crime or vice-versa. Creation of the prominent think-tank Fundación Paz Ciudadana by Agustin Edwards in the early 1990s certainly kept the penal populist view in the public eye, but without detailed survey data it would be impossible to draw any conclusions about the overall effect it had on public opinion.

If we take into account that public opinion influences the direction of policy, I would suggest that Chile needs to get serious about this point and improve the quality and scope of surveys. One option that seems viable is including a module in the National Urban Survey on Citizens security in order to obtain information about how punitive the public attitudes are (for instance Allen 2002 and Hough and Roberts 2004).

To relate my interview analysis to the literature review, the views of the children's rights advocates are highly influenced by international treaties. These people may have formed their view on the need to reform the system before the UNCRC was devised, but this particular treaty gave them a framework and motivation to achieve some of their aims. On the opposite side, several of the views of the citizens' security advocates relate to a penal populist approach.

Effects of reform

After years of struggle, it can be said that the Act contains elements supported by both coalitions, although the scales are now tipped in favour of a punitive approach. Thus, the new Act has considerable contradictions when one looks at its objectives and its ways of tackling youth crime.

The changes in the Chilean youth justice system were less dramatic than expected by many involved in reform. The rules of the UNCRC were only partially incorporated into Chilean legislation and were subjected to moderation due to the influence of the citizen's security advocates. The new Act is both ambiguous (sanctions and measures are not well defined, such as "assisted liberty" and "special assisted liberty" which have separate definitions in the Act, but are understood by the interviewees as having the same effect) and rigid (there is a "menu" that prescribes the type of sentence that magistrates must follow for certain types of offence). In the new system the decision making process consists of negotiation between defence lawyers and public prosecutors, while judges have lost their power of discretion.

The guiding principles of the Act stated that the deprivation of liberty would be used as a measure of last resort. However those statements can be considered rhetorical as in the sentencing guidelines the maximum time that 16 to 18 year olds can spend in prison was established as 10 years. This tendency towards the expansion of punitive measures can be also observed in the "Larraín proposition" (banning judges from replacing all day imprisonment for nightlong imprisonment sentences when the total sanction lasts five years or more) supported by politicians from all the spectrum in the Senate. In practice, long term imprisonment sentences are not used very often, although some abuse on using custody sentences has been reported. The reason why a minority of all the sanctions are carried out using community sentences is related to the type of offences committed by adolescents, with petty theft making up the majority of the cases.

One of the prominent aspects of the UNCRC that was only partially implemented in Chilean legislation was the specialisation of institutions and professionals. From my studies I found that the lack of specialisation of institutions and their professionals and other staff puts adolescents at a disadvantage before the law. An important question, with serious

consequences is “to what extent are decisions by members of the judicial system influenced by their degree of knowledge / specialisation?” I am not able to answer this question with certainty, but in my opinion, it is likely that their pre-conceptions can be modified with an improved knowledge of adolescence as a period in life with certain characteristics, as well as awareness of the contents of the UNCRC and research on the topic.

To conclude this section, it is worth mentioning that even though some of the features of the reform to the system resulted in a more punitive approach [the possibility of spending up to ten years in prison is there], the changes at least bring some certainty to young people's situation in the system. They now can know how long their sentence will last and have the assistance of a lawyer guaranteed by law as well as the process being carried out formally considering all the rules of the due process.

Do we need further reforms?

In order to complete the reform, a transformation of the practices carried out in the youth justice system is necessary, as well as more visibility for the practical problems that affect adolescents' lives in their everyday life, such as the availability of appropriate accommodation in detention centres (hot water, heating, access to health services and activities) and the professionalisation of the staff dealing directly with young offenders⁹³.

Two aspects from the UK that the Chilean system could benefit from are a Children's commissioner and an independent police complaints system. There is a need for a new system to deal with the lack of accountability in the police, which ensure that it is very difficult for people who have been mistreated to seek redress. As for a children's commissioner, the National Minors Service currently have initiatives to present the views of young people

⁹³ In Chile there is not enough specialisation and the degree of youth worker does not exist, as a result people working directly with adolescents are usually just school graduates.

about policies that affect them. This service is being restructured to divide youth justice from more general matters. A children's commissioner with accountability could have more presence and authority on these matters.

There is also a need for a more systematic approach to examine independently the effects of a reform, at an appropriate interval once it has been introduced. Currently there are studies carried out along these lines, but not systematically, and there are problems encountered with measuring the effects, which can only be improved with the more accurate recording of data.

Implications of this thesis

This study would be of interest for policy makers and people working in the youth justice system. One aspect in which this thesis could contribute to the enhancement of the system is to provide tools for reflecting about the role of each actor and their influence on how the system works. Increasing awareness about ideas and beliefs influencing both the law and its implementation is one of the outcomes that could help policy makers and politicians to think thoroughly about youth crime and society. With a framework in place, any area of government policy could be analysed to show the influence that individuals and organisations had on its development.

This investigation can also be used as a starting point for a more detailed project on comparative youth justice in Latin America. In the section on youth justice in Latin America I mentioned that developments were fairly homogenous, with reforms aimed in the same direction being launched within years of each other. Questions that can be asked in relation to this include:

- How closely were Latin American countries working together on these reforms?

- What was the role of individuals and organisations working with a range of Latin American countries to help with these policy developments.
- What are the local differences in these policy developments and is it possible to show events that could have influenced these differences.
- What are the differences in practices across Latin America, even after similar reforms have been attempted.

Bibliography

- ABERBACH, J. D. & ROCKMAN, B. A. 2002. Conducting and Coding Elite Interviews. *Political Science and Politics*, 35, 673-676.
- ALTHUSSER, L. 1971. Ideology and Ideological State Apparatuses (Notes toward an Investigation) Lenin and Philosophy and Other Essays. New York and London: Monthly Review Press.
- ASHWORTH, A. 2007. Sentencing. In: MAGUIRE, M., MORGAN, R. & REINER, R. (eds.) *The Oxford handbook of criminology*.
- BALDWIN, J. 2000. Research on the criminal courts. In: KING, R. D. & WINCUP, E. (eds.) *Doing research on crime and justice*. Oxford University Press, Oxford and New York.
- BELOFF, M. 1999. Modelo de protección integral de los derechos del niño y de la situación irregular: Un modelo para armar y otro para desarmar. *Justicia y Derechos del Niño*, 1, 9-21.
- BELOFF, M. 2001. Algunas confusiones en torno a las consecuencias jurídicas de la conducta transgresora de la ley penal en los nuevos sistemas de justicia juvenil latinoamericanos. In: GARCÍA MÉNDEZ, E. (ed.) *Adolescentes y responsabilidad penal*. Buenos Aires: Ad Hoc.
- BERGER, R. J. & GREGORY, P. D. 2009. Introduction In: BERGER, R. J. & GREGORY, P. D. (eds.) *Juvenile Delinquency and Justice: Sociological Perspectives* Lynne Rienner Publishers.
- BERNALES, M. & ESTRADA, F. 2002. Adolescentes y Niños: Policía y Centros de Privación de Libertad. In: COX, F. (ed.) *Tortura, derechos humanos y justicia criminal en Chile (Resultado de una investigación exploratoria)*. Santiago: Centro por la Justicia y el Derecho Internacional CEJIL and Centro de Investigaciones Jurídicas de la Escuela de Derecho Universidad Diego Portales.
- BERRÍOS, G. 2006. Derechos de los Adolescentes y Actividad Persecutoria Previa al Control Judicial de la Detención. *Revista de Estudios de la Justicia*, 7, 121-157.
- BERRÍOS, G. 2011. La ley de responsabilidad penal del adolescente como sistema de justicia: análisis y propuestas. *Política Criminal*, 6, 163-191.
- BERRÍOS, G. & VIAL, L. 2011. Tres años de vigencia Ley de responsabilidad penal del adolescente. Defensoría Penal Pública-UNICEF.
- BERRY, J. M. 2002. Validity and reliability issues in elite interviewing. *Political Science and Politics*, 35, 679-682.
- BIBLIOTECA DEL CONGRESO NACIONAL 2005. Historia de la Ley No. 20084. Biblioteca del Congreso Nacional
- BIBLIOTECA DEL CONGRESO NACIONAL 2007. Historia de la ley No. 20191. Biblioteca del Congreso Nacional.

- BLACK, H. C. 2009. Black's Law Dictionary. In: GARNER, B. A. (ed.) *Black's Law Dictionary*. 9th ed. St Paul, MN: West.
- BLANCO, R. 2003. El programa de justicia del gobierno de Eduardo Frei. In: MUÑOZ, Ó. & STEFONI, C. (eds.) *El período del Presidente Frei Ruiz-Tagle: Reflexiones sobre el segundo gobierno concertacionista*. Santiago: Editorial Universitaria.
- BOTTOMS, A. 2000. The relationship between theory and research in criminology. In: KING, R. D. & WINCUP, E. (eds.) *Doing research on crime and justice*.
- BOURDIEU, P. 1979. Public opinion does not exist. *Communication and class struggle*. New York: International General.
- BOURDIEU, P. 1986. Force of Law: Toward a Sociology of the Juridical Field, The. *Hastings LJ*, 38, 40.
- BOWLING, B. & PHILLIPS, C. 2002. *Racism, crime and justice*, Addison-Wesley Longman Ltd.
- BOX, S. 1981. Deviance, reality and society. Second ed.: Holt, Rinehart and Winston.
- BROWN, A. D. 1998. Narrative, Politics and Legitimacy in an IT Implimentation. *Journal of Management Studies*, 35, 35-58.
- BRYMAN, A. 2006. Integrating quantitative and qualitative research: how is it done? *Qualitative Research*, 6, 97-113.
- BRYMAN, A. 2008. *Social Research Methods*, Oxford University Press.
- CÁMARA DE DIPUTADOS. *Mensajes Presidenciales Ante el Congreso Pleno* [Online]. Available: http://www.camara.cl/camara/historia_archivo.aspx.
- CARRANZA, E. & MAXERA, R. 2005. Los sistemas de justicia penal juvenil en América Latina. Análisis comparado. VII Jornadas sobre Justicia Penal. Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México: Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM.
- CASTEL, R. 1997. *La metamorfosis de la cuestión social: una crónica del salariado*, Buenos Aires, Paidós.
- CENTRO DE ESTUDIOS PÚBLICOS (CEP)
http://www.cepchile.cl/dms/lang_1/cat_443_pag_1.html
- CHRISTIE, N. 2004. *A suitable amount of crime*, Routledge.
- CILLERO, M. 2005. La responsabilidad penal de adolescentes y el Interés superior del niño. Available: http://www.unicef.cl/archivos_documento/162/justicia_7.pdf
- CILLERO, M. & BERNALES, M. 2002. Derechos humanos de la infancia/adolescencia en la justicia "penal de menores" de Chile: evaluación y perspectivas. *Revista de Derechos del Niño*, 1.

- CILLERO, M. & MADARIAGA, H. 1999. *Infancia, derecho y justicia; situación de los derechos de los niños en América Latina y la reforma legislativa en la década de los noventa*, Santiago de Chile, UNICEF/Universidad de Chile.
- CIPER CHILE (Centro de Investigación Periodística- Journalistic Research Centre)
<http://ciperchile.cl/2009/10/08/la-historia-secreta-del-secuestro-de-cristian-edwards/>
- COHEN, S. 1996. Crime and politics: spot the difference. *The British Journal of Sociology*, 47, 1-21.
- COLEMAN, C. & MOYNIHAN, J. 1996. *Understanding crime data: Haunted by the dark figure*, Open University Press.
- COLLIERS, S. & SATER, W. F. 2004. *A history of Chile, 1808-2002*, Cambridge, Cambridge University Press.
- COMITÉ DE EXPERTOS RESPONSABILIDAD PENAL ADOLESCENTE 2006. Primer Informe Comité de Expertos Responsabilidad Penal Adolescente. Santiago de Chile.
- COMITÉ DE EXPERTOS RESPONSABILIDAD PENAL ADOLESCENTE 2007. Segundo Informe Comité de Expertos Responsabilidad Penal Adolescente. Santiago.
- CORREA, J. & JIMÉNEZ, M. A. 1995. Acceso de los pobres a la justicia en Chile. In: VANDERSCHUREN, F. & OVIEDO, E. (eds.) *Acceso de los pobres a la justicia en países de América Latina*. Santiago de Chile: Ediciones SUR
- CORTÉS, J. 2007. La ley de responsabilidad penal de adolescentes en el marco de las transformaciones actuales del control social y el castigo.
- CORTÉS, J. 2009. La infancia y el sistema penal chileno: la ley de responsabilidad penal de adolescentes en el marco de las transformaciones actuales del control social y el castigo. *Nueva doctrina penal*, 35-66.
- COTTERRELL, R. 1983. The Sociological Concept of Law. *Journal of Law and Society*, 10, 241-255.
- COTTERRELL, R. 1998. Why Must Legal Ideas Be Interpreted Sociologically? *Journal of Law and Society*, 25, 171-192.
- COUSO, J. A. 2004. The politics of Judicial Review in Chile in the Era of Domestic Transition, 1990-2002. In: GLOPPEN, S., GARGARELLA, R. & SKAAR, E. (eds.) *Democratization and the judiciary. The accountability function of courts in new democracies*. Great Britain: Frank Cass Publishers.
- COUSO, J. 2003. La otra violencia: Poder penal doméstico sobre los niños en el Derecho chileno.
- COUSO, J. 2009. La política criminal para a dolescentes y la Ley 20.084. *Justicia y Derechos del Nino*, 11, 213-246.

- DAMMERT, L. 2003. El gobierno de la seguridad en Chile. Available: http://www.urbalvalparaiso.cl/p4_urbalred14/site/artic/20031119/asocfile/DAMMERT_Chile.pdf.
- DAMMERT, L., RUZ, F. & SALAZAR, F. 2008. ¿Políticas de seguridad a ciegas? Desafíos para la construcción de sistemas de seguridad en América Latina. First edition ed. Santiago de Chile: Flacso.
- DE FERRARI, L. I. 2006. Notas sobre la génesis y desarrollo de la ley sobre responsabilidad penal de adolescentes de Chile. *Justicia y Derechos del Niño*, 8, 113-158.
- DEFENSORÍA PENAL PÚBLICA, 3 años de vigencia Ley de responsabilidad penal del adolescente 8 de Junio de 2007 a 7 de Junio de 2010. Santiago: Defensoría Penal Pública, 2011.
- DEFENSORIA PENAL PÚBLICA, Informe Estadístico Primer año de vigencia Ley de Responsabilidad Penal Adolescente (8 junio 2007 a 7 junio 2008), Santiago: Defensoría Penal Pública, 2008.
- DEFLEM, M. 2008. *Sociology of law: visions of a scholarly tradition*, Cambridge University Press.
- DEL OLMO, R. 1975. Limitations for the prevention of violence: The Latin American reality and its criminological theory. *Crime and Social Justice*, 21-29.
- DEL OLMO, R. 1999. The development of criminology in Latin America. *Social Justice*, 26, 19-45.
- DOLOWITZ, D. P. & MARSH, D. 2000. Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making. *Governance*, 13, 5-23.
- DONZELOT, J., CADALSO, J. & DELEUZE, G. 1979. La policía de las familias, Pre-textos.
- DOOB, A. N. & TONRY, M. 2004. Varieties of Youth Justice. *Crime and Justice*, 31, 1-20.
- DUCE, M. 2009. El derecho a un juzgamiento especializado de los jóvenes infractores en el derecho internacional de los derechos humanos y su impacto en el diseño del proceso penal juvenil. *Revista Ius et Praxis*, 15, 73-120.
- DUCE, M. 2010. El Derecho a un juzgamiento especializado de los jóvenes infractores en el nuevo proceso penal juvenil chileno. *Política criminal*, 5, 280-340.
- FAIRCLOUGH, N. 1995. *Media and discourse*, London, Hodder Headline Group.
- FAIRCLOUGH, N. 2001. *Language and power*, Longman.
- FAIRCLOUGH, N. 2003. *Analysing discourse: textual analysis for social research* London, Routledge.
- FAIRCLOUGH, N. & WODAK, R. 1997. Critical Discourse Analysis *In: DIJK, T. A. V. (ed.) Discourse as Social Interaction. Discourse Studies: A*

Multidisciplinary Introduction Volume 2. First ed. London SAGE Publications.

- FAÚNDEZ, J. 2005. The Rule of Law Enterprise: Promoting a Dialogue between Practitioners and Academics. *Democratization*, 12, 567 - 586.
- FEILZER, M. & HOOD, R. 2004. Differences or discrimination. *Minority ethnic young people in the youth justice system*. London: Youth Justice Board.
- FERNÁNDEZ, H. 1994. Menores Infractores de Ley. Análisis Normativo y Régimen Fático de Tratamiento Judicial. *Serie Documental B*. Santiago de Chile: SENAME.
- FFRENCH-DAVIS, R. & MUÑOZ, Ó. 2003. Las políticas económicas y sus efectos. In: MUÑOZ, Ó. & STEFONI, C. (eds.) *El período del Presidente Frei Ruiz-Tagle: reflexiones sobre el segundo gobierno concertacionista*. Santiago.
- FIELD, S. & NELKEN, D. 2010. Reading and writing youth justice in Italy and (England and) Wales. *Punishment & Society*, 12, 287-308.
- FIONDA, J. 1998. Case commentary: The age of innocence? The concept of childhood in the punishment of young offenders (R v Secretary of State for the Home Department ex parte Venables and Thompson). *Child and Family Law Quarterly*, 10, 77-87.
- FIONDA, J. 2005. *Devils and angels: youth, policy and crime*, Hart Publishing.
- FRIEDMAN, L. M. 1986. Law and Society Movement, The. *Stanford Law Review*, 38, 763-780.
- FUENTES, C. 2006. Advocacy Networks and Police Reform: Assessing their Impact. In: TULCHIN, J. & RUTHENBURG, M. (eds.) *Toward a Society Under Law: Citizens and their Police in Latin America*. Baltimore: The Johns Hopkins University Press and The Woodrow Wilson Center for Scholars.
- FUNDACIÓN PAZ CIUDADANA 2010. Construcción de indicadores de reinserción social de adolescentes infractores de la ley penal. Fundación Paz Ciudadana.
- GARCÍA MÉNDEZ, E. 1994. La Convención Internacional de los Derechos del Niño: Del menos como objeto de la compasión-represión ala infancia-adolescencia como sujeto de derechos In: GARCÍA MÉNDEZ, E. (ed.) *Derecho de la infancia-adolescencia en América Latina: De la situación irregular a la protección integral*. Santa Fe de Bogotá: Forum Pacis.
- GARCÍA MÉNDEZ, E. 1998. Legislaciones-infanto juveniles en América Latina: Modelos y tendencias. In: UNICEF-OEA (ed.) *Derecho a tener derechos. Infancia, Derecho y Políticas Sociales en América Latina*. UNICEF-OEA.

- GARCÍA MÉNDEZ, E. 2001. La dimensión política de la responsabilidad penal de los adolescentes en América Latina: notas para La construcción de una modesta utopía. In: GARCÍA MÉNDEZ, E. (ed.) *Infancia y adolescencia: de los derechos y de la justicia*. Mexico D.F.: UNICEF: Fontamara.
- GARCÍA MÉNDEZ, E. & CARRANZA, E. 1990. *Infancia, adolescencia y control social en América Latina*, Buenos Aires, Editorial De Palma.
- GARRETÓN, M. A. 1989. *La posibilidad democrática en Chile*, Santiago de Chile, FLACSO.
- GARRETÓN, M. A. 2007. The Socio-Political Matrix and Economic Development in Chile. Manchester: Research Programme Consortium for Improving Institutions for Pro-Poor Growth, University of Manchester
- GARRETÓN, M. A. & GARRETÓN, R. 2010. La democracia incompleta en Chile: La realidad tras los rankings internacionales. *Revista de ciencia política (Santiago)*, 30, 115-148.
- GOLDSON, B. & MUNCIE, J. 2006. Rethinking youth justice: comparative analysis, international human rights and research evidence. *Youth Justice*, 6, 91.
- GOLDSTEIN, K. 2002. Getting in the door: Sampling and completing elite interviews *Political Science and Politics*, 35, 669-672.
- GOMM, R., HAMMERSLEY, M. & FOSTER, P. (eds.) 2009. *Case study method*: SAGE Publications.
- GÜELL, P. 1999. Familia y modernización en Chile. In: COMISIÓN DE EXPERTOS EN TEMAS DE FAMILIA, N. W. S. S. S. (ed.). Santiago.
- HATCH, J. A. 2002. *Doing qualitative research in education settings*, State University of New York Press.
- HAYWARD, K. & YAR, M. 2006. The 'chav' phenomenon: Consumption, media and the construction of a new underclass. *Crime, Media, Culture*, 2, 9-28.
- HEIDENSOHN, F. & GELSTHORPE, L. 2002. Gender and crime. *Oxford handbook of criminology*.
- HOECKER, L. 2000. Antecedentes de la instalación de la inseguridad ciudadana como preocupación prioritaria de la opinión pública. *Revista de la Academia*, 5, 35-49.
- HOUGH, M., MAXFIELD, M., MORRIS, B. & SIMMONS, J. 2007. British Crime Survey After 25 Years. In: HOUGH, J. & MAXFIELD, M. G. (eds.) *Surveying crime in the 21st century: commemorating the 25th anniversary of the British crime survey*. Criminal Justice Press.
- HOUGH, M. & ROBERTS, J. V. 2004. *Youth crime and youth justice: Public opinion in England and Wales*, The Policy Press.
- HOWE, K. R. 1988. Against the quantitative-qualitative incompatibility thesis or dogmas die hard. *Educational Researcher*, 17, 10-16.

INSTITUTO INTERAMERICANO DEL NIÑO, LA NIÑA Y ADOLESCENTES
http://www.iin.oea.org/explotacion_Sexual/versi%C3%B3n%20final/Anexo%20II.htm

JIMÉNEZ, M. A. 2000. Adolescentes privados de libertad y justicia de menores. Santiago de Chile Universidad Diego Portales

KITSUSE, J. I. & CICOUREL, A. V. 1963. A note on the uses of official statistics. *Social Problems*, 11, 131-139.

KLIKSBERG, B. 2008. ¿Cómo enfrentar la inseguridad en América Latina? La falacia de la mano dura. *Revista Nueva Sociedad*, 4-16.

LEECH, N. & ONWUEGBUZIE, A. 2007. A typology of mixed methods research designs. *Quality and Quantity*, 43, 265-275.

LICHTMAN, M. 2006. *Qualitative Research in Education: A User's Guide.*, California, SAGE Publications.

LIGHT, R. J. 1979. Capitalizing on variation: How conflicting research findings can be helpful for policy. *Educational Researcher*, 7-11.

LUHMANN, N. 1988. Law as a social system. *Northwestern University Law Review* 83, 136-150.

MAGUIRE, M. 2002. Crime Statistics: The 'data explosion' and its implications. In: MAGUIRE, M., MORGAN, R. & REINER, R. (eds.) *The Oxford handbook of criminology*.

MAGUIRE, M. 2007. Crime data and statistics. In: MAGUIRE, M., MORGAN, R. & REINER, R. (eds.) *The Oxford handbook of criminology*.

MALDONADO, F. 2004. La especialidad del sistema de responsabilidad penal de adolescentes. Reflexiones acerca de la justificación de un tratamiento penal diferenciado. *Justicia y Derechos del Niño*, 6, 103-160.

MATUS, A. 2012. Violencia policial contra niños. *Paula*. Santiago de Chile: Consorcio Periodístico de Chile S.A.

MAY, T., GYATENG, T. & HOUGH, M. 2010. Differential treatment in the youth justice system. Institute for Criminal Policy Research.

MCBARNET, D. 1976. Pre-trial Procedures and the Construction of Conviction. *The Sociology of Law*. Keele: University of Keele Sociological Review Monograph.

MCBARNET, D. 2003. When compliance is not the solution but the problem: From changes in law to changes in attitude. *Taxing democracy: Understanding tax avoidance and evasion*, 229.

MCCONVILLE, M., SANDERS, A. & LENG, R. 1991. The case for the prosecution: Police suspects and the construction of criminality, Routledge London.

MELLER, P. 1991. Adjustment and Social Costs in Chile during the 1980s. *World Development*, 19, 1545-1561.

METTIFOGO, D. & SEPÚLVEDA, R. 2004. *La situación y el tratamiento de jóvenes infractores de ley en Chile*, Santiago, Centro de Estudios en Seguridad Ciudadana Universidad de Chile.

MINISTRY OF DEFENCE

<http://www.defensa.cl/2011/07/19/palabras-del-ministro-de-defensa-andres-allamand-en-el-traspaso-de-carabineros-de-chile-y-pdi-al-min/>

MINISTRY OF JUSTICE 2002. Mensaje de S.E. el Presidente de la República con el que inicia un proyecto de ley que establece un sistema de responsabilidad de los adolescentes por infracciones a la ley penal.

MINISTRY OF JUSTICE 2006. Evolución de aprehensiones a adolescentes por parte de Carabineros de Chile. Una revisión de las cifras entre los años 1990 a 2005 (Unpublished report.).

MINISTRY OF THE INTERIOR 2004. Política nacional de seguridad ciudadana.

MUNCIE, J. 2004. Youth justice: globalisation and multi-modal governance. In: NEWBURN, T. & SPARKS, R. (eds.) *Criminal Justice and Political Cultures*. Willan Publishing.

MUNCIE, J. 2005. The globalization of crime control—the case of youth and juvenile justice. *Theoretical Criminology*, 9, 35-64.

MUNCIE, J. 2008. The 'Punitive Turn' in Juvenile Justice: Cultures of Control and Rights Compliance in Western Europe and the USA. *Youth Justice*, 8, 107-121.

MUÑOZ, L. 2008. Los jóvenes y el nuevo Sistema de Responsabilidad Penal Adolescente a un año de su implementación. Serie Reflexiones. Santiago: UNICEF.

NATIONAL CRIME PREVENTION COUNCIL.USA <http://www.ncpc.org/>

NELKEN, D. 1981. The 'Gap Problem' in the Sociology of Law: A Theoretical Review. *Windsor Yearbook of Access to Justice*.

NELKEN, D. 1984. Law in action or living law? Back to the beginning in sociology of law. *Legal Studies*, 4, 157-174.

NELKEN, D. 1998. Blind Insights? The Limits of a Reflexive Sociology of Law. *Journal of Law and Society*, 25, 407-426.

NELKEN, D. 2001. Can Law Learn from Social Science. *Israel Law Review*, 35, 205-224.

NEWBURN, T. 2007. *Criminology*, Willan Publishing.

NEWBURN, T. & SPARKS, R. (eds.) 2004. *Criminal justice and political cultures*: Willan Publishing.

NOAKS, L. & WINCUP, E. 2004. *Criminological research: Understanding qualitative methods*, Sage Publications Ltd.

O'DONNELL, G. 2004. Why the Rule of Law matters. *Journal of Democracy*, 15.

- OVIEDO, E. 2002. Democracia y seguridad ciudadana en Chile. *In: CONSEJO LATINOAMERICANO DE CIENCIAS SOCIALES (ed.) Violencia, sociedad y justicia en América Latina*. Buenos Aires: CLACSO.
- PACKER, H. L. 1964. Two Models of the Criminal Process. *University of Pennsylvania Law Review*, 113, 1-68.
- PAGE, E. C. 2006. The origins of policy. *In: MORAN, M., REIN, M. & GOODIN, R. E. (eds.) The Oxford Handbook of Public Policy*. Oxford: Oxford University Press.
- PASTOR, D. 2004. Origins of the Chilean Binominal Election System. *Revista de Ciencia Política*, 24, 38-57.
- PILOTTI, F. 1999. The Historical Development of the Child Welfare System in Latin America. *Childhood*, 6, 408.
- PION-BERLIN, D. 1989. Latin American National Security Doctrines: Hard and Softline Themes. *Armed Forces & Society*, 15, 411-429.
- PLATT, A. 1969a. *The child savers: the invention of delinquency*, University of Chicago Press.
- PLATT, A. 1969b. The Rise of the Child-Saving Movement: A Study in Social Policy and Correctional Reform. *The ANNALS of the American Academy of Political and Social Science*, 381, 21-38.
- PLATT, A. 2009. The Child-Saving Movement and the Origins of the Juvenile Justice System. *In: BERGER, R. J. & GREGORY, P. D. (eds.) Juvenile Delinquency and Justice: Sociological Perspectives*. Lynne Rienner Publishers.
- POLKINGHORNE, D. E. 1995. Narrative configuration in qualitative analysis. *International Journal of Qualitative Studies in Education*, 8, 5-23.
- PRILLAMAN, W. C. 2000. *The judiciary and democratic decay in Latin America. Declining confidence in the Rule of Law*, United States of America, Praeger Publishers.
- PROGRAMA DE DERECHOS HUMANOS, Ministry of the Interior and Public Security
http://www.ddhh.gov.cl/ddhh_rettig.html
- RAMOS, M. & GUZMÁN, J. 2000. *La guerra y la paz ciudadana* Santiago de Chile, LOM Ediciones.
- REINER, R. 2007. *Law and order: an honest citizen's guide to crime and control*, Polity Press.
- REINER, R. 2010. *The politics of the police*. Oxford University Press.
- RIEGO, C. & TSUKAME, A. 1998. Estudio del Circuito de Administración de Justicia Juvenil. Santiago de Chile: UNICEF- Ministry of Justice.
- ROBERTS, J. & HOUGH, M. 2005. Sentencing young offenders: Public opinion in England and Wales. *Criminal Justice*, 5.

- ROBERTS, J. E. A. 2003. *Penal populism and public opinion. Lessons from five countries*, Oxford University Press.
- ROJAS, J. 2007. Los derechos del niño en Chile: una aproximación histórica, 1910-1930. *Historia (Santiago)*, 40, 129-164.
- RUESCHEMEYER, D. 2003. Can one or a few cases yield theoretical gains? *In: MAHONEY, J. & RUESCHEMEYER, D. (eds.) Comparative historical analysis in the social sciences*. First ed.: Cambridge University Press.
- SABATIER, P. A. 1987. Knowledge, Policy-Oriented Learning, and Policy Change: An Advocacy Coalition Framework. *Science Communication*, 8, 649-692.
- SABATIER, P. A. & JENKINS-SMITH, H. C. 1993. Policy change and learning: an advocacy coalition approach, Westview.
- SABATIER, P. A. & WEIBLE, C. M. 2007. The advocacy coalition framework: Innovations and clarifications *In: SABATIER, P. A. (ed.) Theories of the policy process*. Westview Press.
- SCHOOL OF JOURNALISM UNIVERSITY DIEGO PORTALES
www.museopublicidad.cl
- SCLATER, S. D. & PIPER, C. 2000. Re-Moralising the Family-Family Policy, Family Law and Youth Justice. *Child & Family Law Quarterly*, 12, 135.
- SENAME 2002. Orientaciones técnicas para proyectos de defensa jurídica de adolescentes inculcados de infringir la ley penal.
- SENAME. 2009 Boletín estadístico anual de los niños (as) y adolescentes vigentes en la red SENAME, Justicia juvenil, Año 2008.
- SENAME. 2010 Boletín estadístico anual de los niños (as) y adolescentes vigentes en la red SENAME, Justicia juvenil, Año 2009.
- SENAME. 2011 Boletín estadístico anual de los niños (as) y adolescentes vigentes en la red SENAME, Justicia juvenil, Año 2010.
- SENAME 2012. Informe 5 años Ley de Responsabilidad Penal Adolescente.
- SOZZO, M. 2006. "Traduttore traditore". Traducción, importación cultural e historia del presente de la criminología en America Latina. *In: SOZZO, M. (ed.) Reconstruyendo las criminologías críticas*. Buenos Aires: Editorial Ad-Hoc.
- SUNKEL, G. 1992. *La prensa en la transición chilena*, FLASCO.
- TSUKAME, A. 2000. Seguridad Ciudadana y derechos juveniles. *Revista de la Academia de Humanismo Crisitano*, 5, 91-102.
- TSUKAME, A. 2008. Trayectorias de adolescentes y jóvenes que infringen la ley penal; contextos institucionales para la intervención *El Observador* 1.
- UNIÓN DEMÓCRATA INDEPENDIENTE. Available: www.udi.cl 2010.

- UN COMMITTEE ON THE RIGHTS OF THE CHILD (CRC) 2002. UN Committee on the Rights of the Child: Concluding Observations: Chile.
- UNITED NATIONS DEVELOPMENT PROGRAMME 1998. Human Development Report. Santiago.
- UNIVERSIDAD DIEGO PORTALES 2009. Informe anual sobre derechos humanos en Chile, Universidad Diego Portales, Facultad de Derecho.
- VAN DIJK, T. A. 1997. Discourse as Interaction in Society. In: DIJK, T. A. V. (ed.) *Discourse as Social Interaction. Discourse Studies: A Multidisciplinary Introduction Volume 2*. First ed. London: SAGE Publications.
- WACQUANT, L. 2002. La Penalización de la Miseria: De la Importación de Políticas de Seguridad. *Revista Renglones* 51, 6-12.
- WACQUANT, L. 2006. Pierre Bourdieu. In: STONES, R. (ed.) *Key sociological thinkers*. Macmillan.
- YIN, R. K. 2006. Mixed methods research: Are the methods genuinely integrated or merely parallel? . *Research in the Schools*, 13 41-47.
- YIN, R. K. 2009. *Case study research. Design and methods*, SAGE Publications.

Legal documents

UNICEF (1989) The United Nations Convention on the Rights of the Child. Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989. [Online] Available from: www.unicef.org

BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE. Ley de Menores No. 16,618 de 1967 (Minors' Act 1967) [Online] Available from: <http://www.bcn.cl/leyes/pdf/actualizado/28581.pdf>

BIBLIOTECA DEL CONGRESO NACIONAL. Ley No. 20,191 de 2007 Modifica la ley No. 20,084, que establece un Sistema de Responsabilidad de los adolescentes por infracciones a la ley penal (Act 20,191 of 2007, This act modifies the 'Adolescents responsibility system for criminal offences act'). [Online] Available from: <http://www.bcn.cl/leyes/pdf/original/261383.pdf>

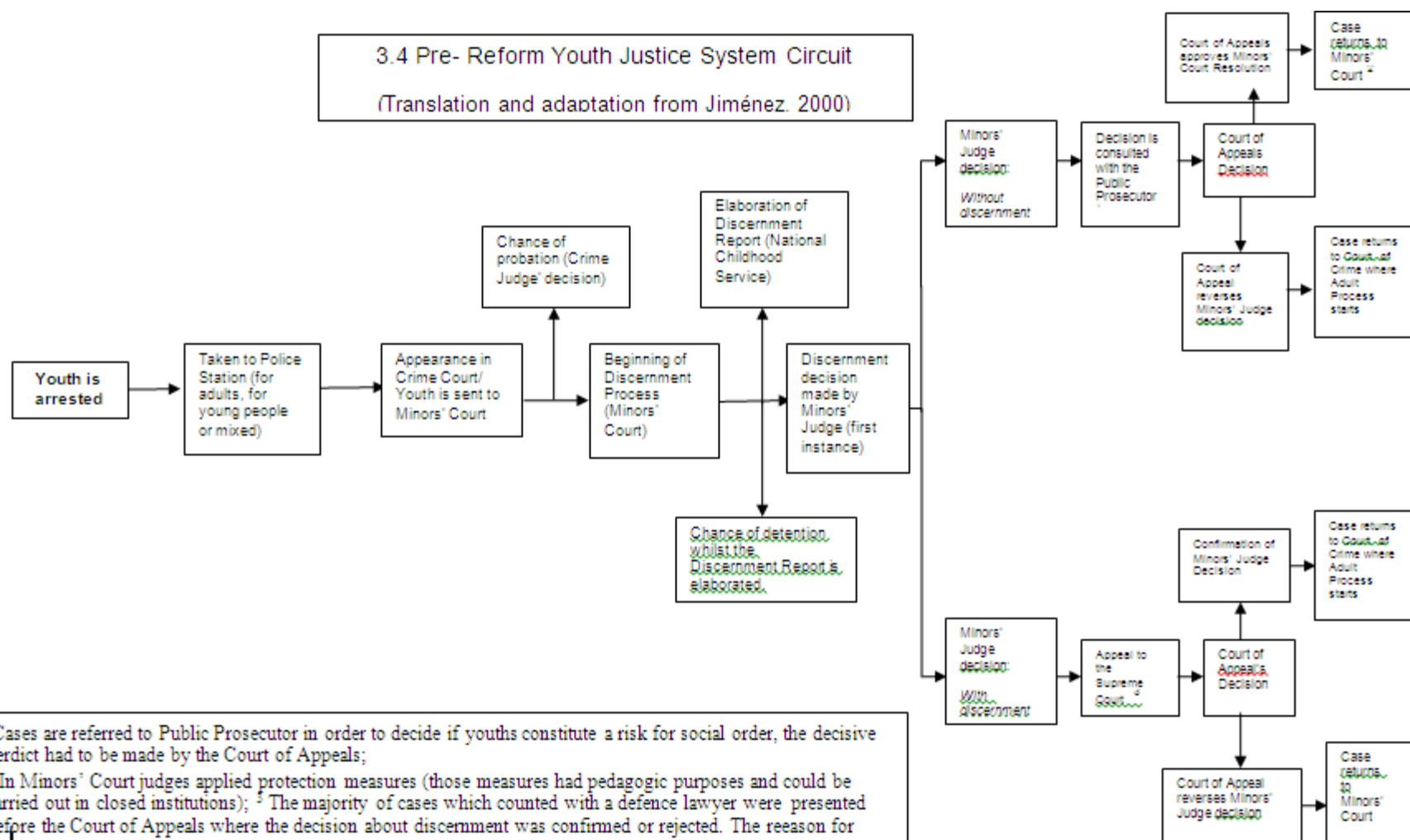
Ley No. 20. 084, que establece un sistema de responsabilidad penal de los adolescentes por infracciones a la ley penal (Act 20,084 of 2007, 'Adolescents responsibility system for criminal offences act'). [Online] Available from:

[http://www.academiajudicial.cl/pdf/legislacion/rpp/Ley N 20084 de responsabilidad penal de los adolescentes.pdf](http://www.academiajudicial.cl/pdf/legislacion/rpp/Ley_N_20084_de_responsabilidad_penal_de_los_adolescentes.pdf)

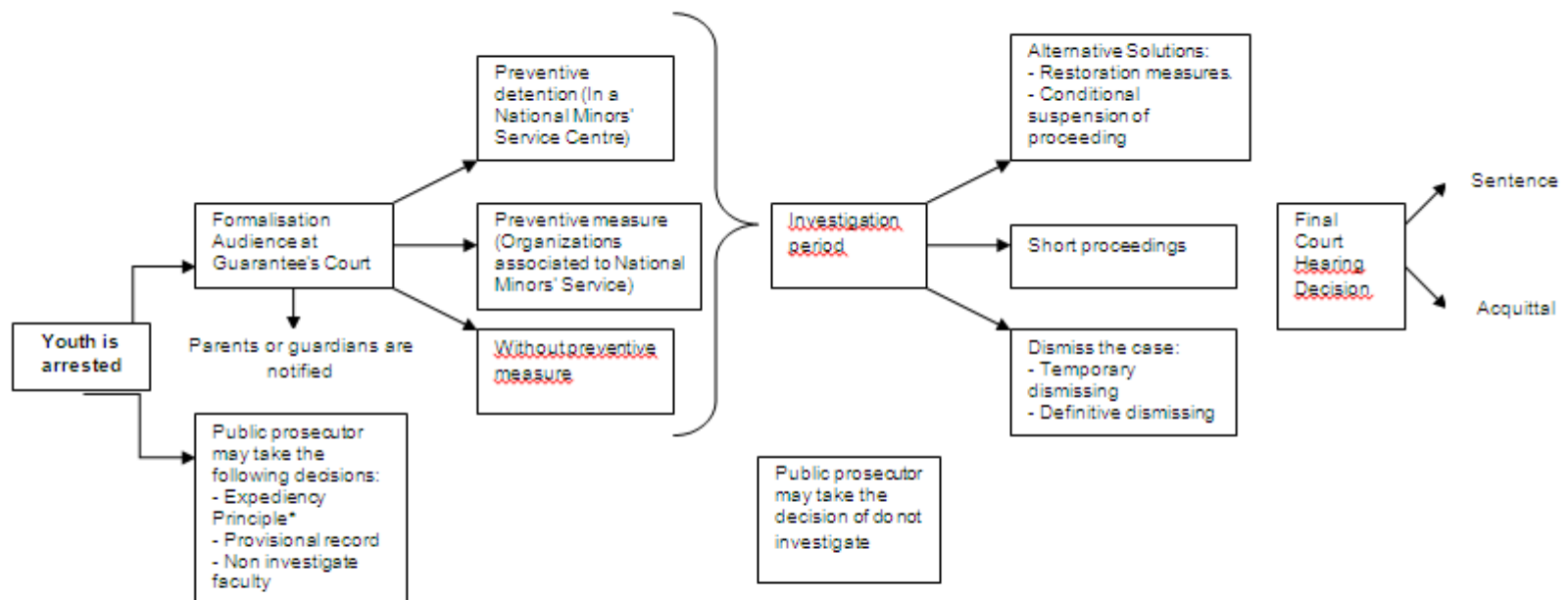
Appendix A. Pre and Post Reform Diagrams of Functioning

3.4 Pre- Reform Youth Justice System Circuit

(Translation and adaptation from Jiménez. 2000)

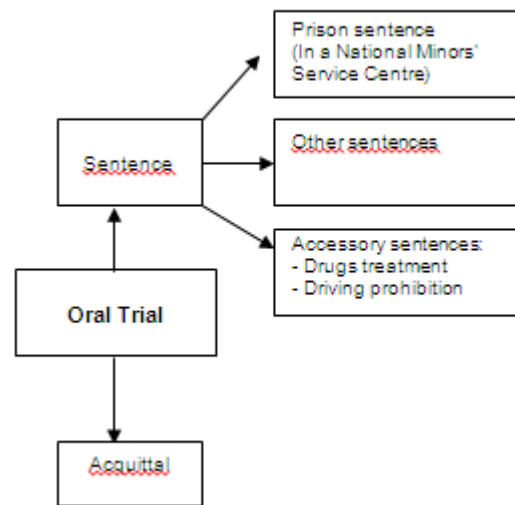


(Translation and adaptation from UNICEF, 2007)



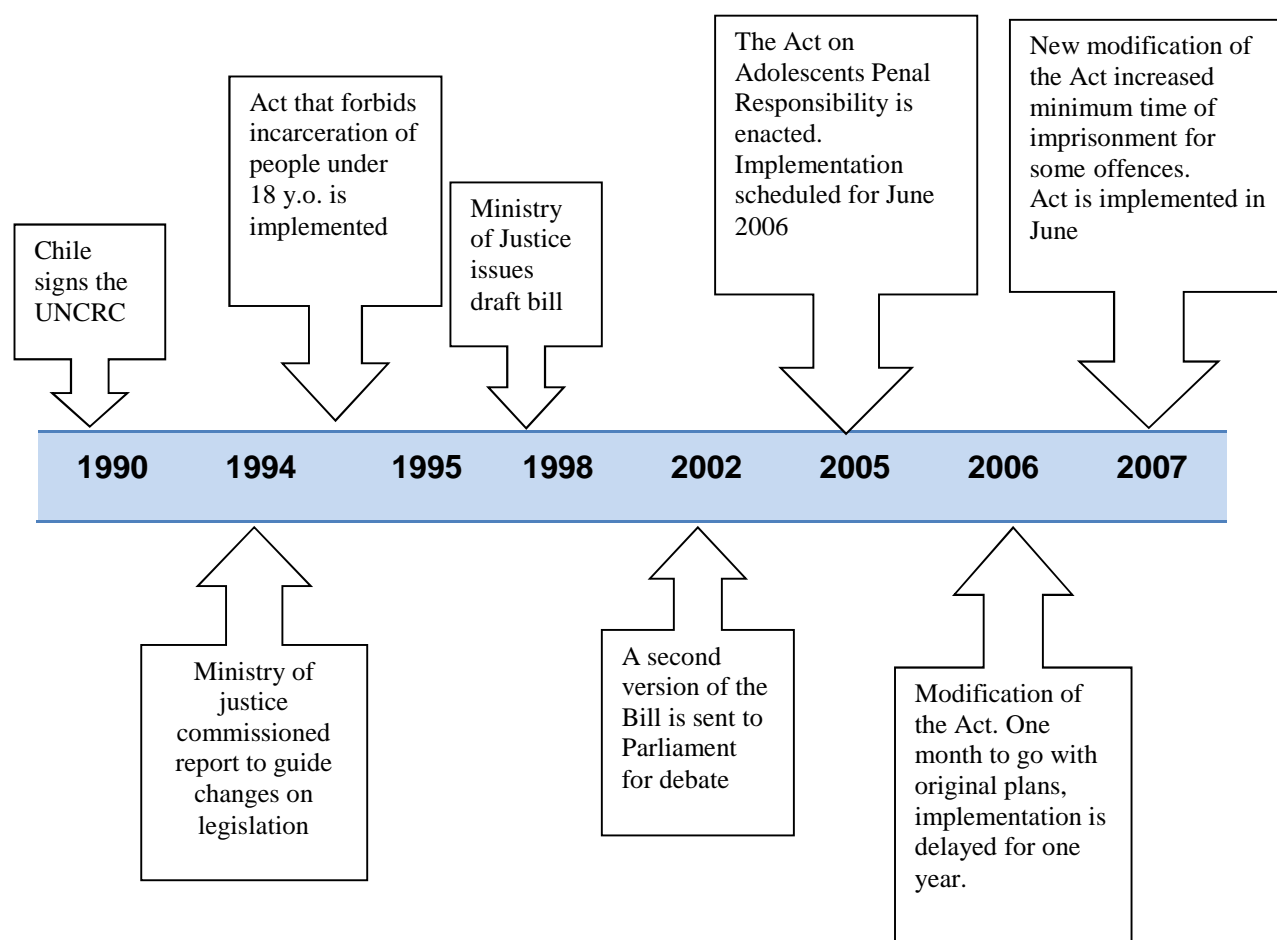
* The expediency principle is a faculty given to the Public Prosecutor to not start penal prosecution against the accused or stop a prosecution that has already been started. The Public Prosecutor can only use this action when the offence is not serious and also has the consent victim.

Criminal Court stage under new system



Appendix B Chilean Youth Justice Reform Milestones

Chilean Youth Justice Reform Milestones



Appendix C. Examples of judicial files contents pre and post reform

In the following section, I have translated the relevant documents of two complete judicial files. The first case corresponds to a youth who is involved in a robbery and it is from the pre-reform period. The second case is taken from the post-reform period and deals with the theft of a mobile phone.

A “successful” case under the Minors’ Act of 1968

This case shows how the criminal system proceeds for one of the most common offences: robbery. This case is interesting because the youth charged with the robbery is integrated in society in a quite accepted way: he attends school regularly and has a satisfactory performance, has possibilities of attending to higher education, lives in an ordinary lower middle class neighbourhood and has a father who is concerned with the situation and very keen to give support to his son. Despite these features which are usually seen as positive, the judge in the Criminal Court decided that the youth should stay in custody until his discernment ability was determined by the Minors' Court. Keeping young people in custody in order to carry out the discernment decision was something very common in the old system. Under the new system, custody is also overused during the investigation of the offence even in case of non-serious offences in which the punishment would not involve imprisonment (see Berríos, 2006 and Defensoría Penal Pública, 2008).

In the case shown below, the Minors' Court decided that the youth was not able to discern between right and wrong, following the recommendations made by the psychologist and social worker in their psycho-social report. In the report they highlighted all the conditions that would contribute to making the youth unlikely to engage in criminal activity, and even though he had

normal socialisation and social integration, they decided that the youth was not able to understand the difference between good and bad behaviour. This kind of recommendation was generally used as a form of “saving” young people considered not excessively “dangerous” to the public. Those who had resources to go back to a normal life away from crime were usually deemed not be discerning and so would not face a harsh punishment. In this case, finally the youth was sent to a supervised release programme and an educative measure. He engaged easily with the intervention and even requested keep attending the centre after reaching adulthood, which could be considered as a very successful intervention.

The next section is a literal translation of this case in chronological order.

The first encounter between young people and the criminal system is the moment when they are arrested by the police. The arrest and the first police report is in general carried out by an ordinary police unit that later send the detainees to a minors' police station which is in charge of looking after young people before they have their first appointment for a hearing in the court⁹⁴.

Apart from the description of the events that originated the arrest, the police report mentions if the detainees have been arrested before and a medical report that check the general condition of the detainees is provided.

April 22th

Police record

“A moment before their detention, when the arresting personnel carried out preventive patrolling in the jurisdictional area of this unit, they were required by XX (victim), aged XX, ID number XX, whose address is XX. The plaintiff declared that before police arrival, two unknown young individuals with uncovered faces threatened her with a blunt instrument (the plaintiff could not

⁹⁴ These police units are also in charge of cases of children's rights protection.

be sure of what the object was) forcing her to give them the sum of \$8000 (ten pounds approximately) in cash. After that they escaped rapidly.

With the antecedents compiled by police personnel, a wide search was carried out around the site of the events, achieving the detention of two young individuals in the corner of streets X and Z. They were recognised by the victim as the authors of the illicit act, mentioned previously. This caused their detention and they are moved to this police unit”.

After the police report, an order to start the investigation is placed by the Criminal Court:

April 23th

Criminal Court starts the investigation of the offence ordering to:

- Start the investigation
- Interrogate the detainees
- Request the presence of the victim
- Request the presence of the policemen involved in the detention

Next in the file, a standardised transcription of the first hearing of the parts in the criminal court is included.

April 23th

Statement made by the youth charged with the offence

XX appears in court, native from Santiago, ID number XX, age, son of X and Z. Literate. His address is XX, who exhorted to tell the truth states:

I am aware of the cause of my detention and state to your Lordship/Ladyship that I was detained by police personnel, the day of yesterday of the present [month], around 20:30 hours in XX because a lady reported us because we had asked her for some money. I was with my friend and classmate Y, we

asked her for money, for some photocopies and some beers. We had the idea of asking pedestrians for money in the street, then we saw a lady coming and Y asked first if she could give us some money and then I told her “Mrs, can you give us money”. When the lady saw us she felt intimidated because, maybe, I said it in other tone because I had drunk alcohol with my friend. The lady hands out the sum of \$7000 [a bit less than £10] and we kept the money. We left walking, when we had walked around half street, the police came on a motorcycle and a police van and arrested us.

That is everything; I read, ratify and sign

April 23th

According to the merit of the antecedents keep X as a detainee.

Communicate in person to the detainees

Detainee' signature

April 26th

Victim statement before the Criminal Court

Appears in court XX from Santiago, ID number, marital status, age, literate, address, who legally under oath states:

I am aware of the causes of my appearing in this court and set out to your Lordship that on date XX, around 20:30 hrs in the moment I got off the bus in the XX bus stop, I could walk just four steps when two boys held my left arm from behind and put something on my back, as it would be some blunt element, and they told me “let’s do it slowly but safe, give us all your money”⁹⁵. I gave them the sum of \$8000, one bill of 5000 and three of 1000.

⁹⁵ According to the victim they used “give us” in an informal way. In Chile, there are two ways to refer to “you”, formally (*usted*) and informally (*tu*). Typically, older people are addressed using *usted*, and it is considered that the informal manner is disrespectful.

And they told me how could it be possible I had not got any more money. I told them I did not and then a youth appeared and said “what is happening there?” These two boys turned, so I did and then I saw them. I moved towards the corner where there was a car with three gentlemen taking merchandise down and one of those gentlemen called the police. I sat in the car and then two policemen passed in motorcycle. I was sat in the car and the youth kept struggling with these kids and in that moment they fled. Then one of the gentlemen that helped me told me that the persons who took my money were coming back. Then a patrol car appeared and they told me I should get on and I had to identify them so they could give me the money back. I went to the police station.

I did not see the individuals’ detention. In the police station they did not show them to me.

When they had these kids in the guard’s van, a police man told me to come to have a look. I saw them and I recognised them because they had the same clothes and one of them because of his baby-face.

The police gave me the money back.

April 26th

After these statements, an identity parade between the police officers involved in the arrest and the detainees took place.

April 26th

When the criminal court finds the evidence of the detainees’ age, the case is sent to the minors’ court where the decision about the discernment is taken.

In the minors' court the judge reads the statement made by the detainees in the criminal court, asking if that is correct. From my research, the following declaration is very typical of those given in a minors' court, with many others following a similar format.

April 26th

First statement by the youth in Minors' Court

The detainee X appears in court, from Santiago, age, datej of birth, current occupation. Son of X and Z. Lives with in X address, who interrogated states:

I am aware of the cause of my detention and I declare that I ratify completely the statement given in criminal court that is being read in this moment. We did not intimidate that lady to make her give us money. We just told her if she could share her change and maybe she felt intimidated by us because we had been drinking. We had had beer but I was not drunk, I was dizzy and therefore I did not know what I was doing. I am not used to asking pedestrians for money and that day we did it for some photocopies and to buy some beer.

I am not good at drinking, but that day I drunk without any special reason and we wanted to keep doing it.

I live with my father, who owns a bakery, and his wife. The economic situation at home is good.

I see my mother every weekend.

I am at the secondary school, in 4th grade and I don't have problems at school.

The court decrees:

Keep the youth in custody.

Ask for integrated report (psycho-social report).

Read, ratify and sign, being notified

X X (young person)

May 7th

In this stage the accused usually get a defence lawyer from some of the charity projects mentioned earlier (see Chapter 3: Youth Justice Reform in Chile: Context, pre-reform and main reform features)

In many cases the discernment report is carried out in detention centres called “Centres of transit and diagnosis”. The format of this report is showed below.

May 9th

Psycho-social report*Youth identification*

- Name
- Date of birth
- Age
- Schooling
- Address
- Detention cause
- Court seeing the case

- Date of the evaluation

Methods used in this evaluation:

- Psycho-social interview with the youth and his or her parents if they are present
- Report made by school
- Psychological tests

Antecedents

- The youth has lived with his father and his stepmother for the last four years. The house is owned by his stepmother, who received the house as inheritance.
- The house is located in a residential area with no problems which could be considered as high risk area, but there are slums around with problematic characteristics.
- The main family income comes from the father who owns a bakery earning around \$600.000 (500 pounds) a month.
- The family comprises of:
 - o Father: Name, age, date of birth, marital status, education, activity.
 - o Father's wife: Name, age, date of birth, marital status, education, activity.
 - o Mother: Name, age, date of birth, marital status, education, activity.
 - o Mother's cohabitant partner: Name, age, date of birth, marital status, education, activity.
 - o Mother's other sons and daughters: Name, age, activity.

- The youth comes from a marriage legally constituted which was legally annulled seven years ago although the relationship broke down ten years ago.
- The relationship broke product of disagreements between the parents. Firstly the mother left home with the youth and went to live with the youth's grandmother. Afterwards, she started her new relationship and did not allow the father of the youth to visit him.
- When the youth was eight years old, his father was able to visit his son again due to a court order.
- The youth tells that he did not like living with his mother's family because the adults left him on his own in the apartment where they lived because the couple worked.
- The mother's partner did not gain respect and love from the youth, despite frequently giving him presents.
- Finally both parents made an agreement in which the father gave the family house (of his property) to the mother in exchange for the custody of their son.
- Since that period the relationship between mother and son started to deteriorate with times in which the mother did not have any contact with her son for periods as long as four months.
- In the aspect of relationships, the youth is close to his father, keeping emotional distance with his mother.
- His stepmother imposes rules and norms that are followed by the youth but the father is stricter and delivers sanctions.
- At school the youth attends 4th year of secondary (final year) in a private school according to a school confirmation letter. He performances adequately but he has had some disciplinary problems in other schools from which he has been expelled.
- Talking about interpersonal relationships, the youth has as hip-hop reference group, they are the main identification model for him. The

youth adapts to this group presenting a stereotyped appearance and values and behaviour according to hip-hop culture.

- The youth had an experimental use of crack cocaine for two weeks. He also has used cannabis for three months and drank alcohol for three years. He drinks alcohol during the weekends at parties.
- Thanks to school's suggestions (due to supposed use of cannabis) the youth has been evaluated several times by psychiatrists and psychologists. These events have not gone further than evaluations and there is no evidence of a treatment giving solutions to the addiction problematic.
- Having showed the antecedents and considering the interest of the parents in giving support to their son in order to overcome his problems (they have found a place in a Christian organisation that offers rehabilitation for addictions) it is considered that the youth does not show risk of offending.

Psycho-social evaluation

- X adapts quickly to the interview situation and he gives the information requested in an open and honest way.
- His appearance shows his concern about his clothing, hygiene and how he looks. This coincides with his age.
- In the mental exam no alteration of thinking is observed. His way of thinking is flexible and present adequate levels of abstraction.
- His language is developed according his socialisation and stimulation environment. His expression and comprehension ability is at the normal levels. He uses some popular jargon and slang.
- In the analysis of emotions, these are characterised for a relaxed mood and some discouragement along with some emotional distance when he refers to certain topics of his life. We consider that this could be explained by conflictive family events.

- X recognises that there was a period when his behaviour was related to drugs use. He states that he is not using drugs any more, although he keeps drinking alcohol. The effect of the alcohol on him involves decided and distorted behaviour according to his parents. The youth was not conscious of this, either of the risk of socialising on the streets.
- Related to the previous issue, X points out that sometimes he has asked for money on the streets with the aim of buying alcohol, however is possible to notice that his account lacks self-criticism and ignores the social judgement where this behaviour does not match with social rules and values. Also is it likely that these activities are carried out in an aggressive tone which causes fear in the public. This reflects that the youth has little comprehension of the social environment. Empathy and social skills need to be developed urgently.
- After his parents' divorce, the youth has lived with his father and his stepmother. He has a good relationship with her. His relationship with his mother has become distant. X is the only child in his home, and that leads us to think that he has a privileged position in receiving support and attention. His father is overprotective and inconsistent in setting rules.
- In this context, his personality is extroverted and his social abilities are developed according to his age although interfered by his lack of social empathy. He looks self-confident and expressive, despite seeming to lack of criticism and even stubborn in that sense he can be considered impulsive. When he drinks alcohol he cannot achieve self-control because it seems he has started an addictive process that should be tackled.
- According to the results of the Lüscher Test, the child is feeling unbearable tension at the time of the test. He is not able to focus on a specific goal. He looks for success and he feels stimulated by a life with plenty of new experiences.

- He has problems acting according to demands, before the angst of facing troubles he wishes to be free from obstacles and internal inhibitions. He is interested in friendly and open encounters.
- He has big emotional requirements and he would like to have a relationship but he does not have preferences, i.e., he is ambivalent about his emotions.
- He wants to be independent and he feels a necessity of having new experiences and success, without considering other people's feelings. He demands respect for his preferences.
- His need for a stable emotional figure has been frustrated and validates his confrontations with himself and the others. He compensates this with his searching for external models and stimulants which unblock his tension.
- In the cognitive area he has developed a normal-average potential. He attends school and he has plans for attending higher education.

Diagnosis summary

X is 17 years and five months old. He comes from a separated couple. In his development has been important the image of his father who controls his son's behaviour although he tends to be overprotective and is inconsistent in setting rules. This situation is enhanced because the son is the only child.

An extroverted personality is observed. His characteristics tend to emotional independence and autonomy. He could even be stubborn. His social empathy is low and the recognition of social norms is deficient which interferes in the relationships that he establishes with other people. This problem requires specialised treatment to improve the way that he interacts and adapts to the environment and also would protect him from taking possible risks.

The youth is not conscious that his alcohol intake could lead him to addiction. However, his parents have taken measures in order to evaluate this problem and had found a place in a specialised institution.

The youth socialises with young people from his area but occasionally he gets together with a group of young people involved in drugs. At least one of those people is involved in crime. We do not detect criminal engagement by the youth.

Family support and school attendance are the protective factors that we have found. The youth has plans of attending high education.

Discernment

Based on the elements described and psycho-social evaluation it is possible to conclude that the youth has acted with **scarce discernment ability** (in bold in the original report).

Recommendation

Respectfully, we suggest to your Lordship/Ladyship that the youth should leave Comunidad Tiempo Joven (detention centre for young people) under the responsibility of his parents with the aim of carrying out the evaluation of his alcohol intake problem. He has a place in the Comunidad Cristiana de Tratamiento Terapéutico (Christian Community for Therapeutic Treatment).

It is also recommended that the youth and his parents start a family therapy where their relationships could be discussed in order to improve the youth development

It is all that we can inform to your Lordship/Ladyship.

Social worker

Psychologist

May 10th

Requesting bail

Z, defence lawyer from the juridical unit of “Hogar de Cristo”⁹⁶ representing X who is deprived of liberty in Comunidad Tiempo Joven because of an alleged armed robbery, respectfully states:

a) The article 347 letter a) from the Penal Code points out that “the detention of a minor with the aim of carrying out the discernment evaluation will be considered deprivation of liberty for all the legal effects and will not stop the criminal judge releasing the youth on bail if this is in agreement with general rules. Is not an impediment the fact that the discernment evaluation has not been carried out”. This implies that the discernment evaluation cannot be considered as a procedure that does not allow releasing the youth on bail.

b) This case involves a minor that is *doli incapax* and this lack of ability must be presumed while the decision about his or her discernment has not been taken. This makes possible to affirm that there are not antecedents to predict that the liberty of the youth puts in danger the safety of society.

c) There is not merit to affirm that the end of the minor's deprivation of liberty is a risk for the victim.

d) The article 37 letter b from the UNCRC points out that “no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”. According to the 5th article in the 2nd part of the Political Constitution, international treaties signed by Chile are a limit to the legal authority of all the state's institutions.

⁹⁶ Charity linked to the Catholic church that started legal assistance programmes before the criminal law provided defence lawyers free of charge for young people.

Therefore, may your Lordship/Ladyship provide:

Bestow on bail to my represented.

May 11th

Answer from the Criminal Court

Considering the merit of the antecedents and before the lack of qualified reasons to deny liberty to the minor X, and also according to the article 361 from the Criminal Code, liberty on bail has been conceded for the minor X. The amount of the bail is \$20000 (25 pounds).

Communicate it and send it in consult with the Court of Appeals.

May 14th

Answer from the Court of Appeal (where three magistrates review the decision made by the Criminal Court)

The request has been approved.

Has voted against the decision Magistrate A, who stood by denying release requested for X (the youth) due to the merit of the defendant's antecedents which allow her to estimate that his liberty puts in risk the safety of society. Her statement is based on the form and circumstances of the offence that is being investigated and the article 363 from the Criminal Code.

Send it back to the Criminal Court.

Magistrates signatures

Once the decision about bail is ratified by the Court of Appeal and the bail is paid, the youth is released from custody.

May 14th

Criminal Court orders realise on bail

I certify that I had received \$20000 in order to pay the bail of X. The money was deposited by his father Y.

According to the merits I order that X is released on bail.

May 14th

Bail

I certify that I have communicated with the statistics department of the Comunidad Tiempo Joven and I was told that the minor X was put in liberty on X date according to the request of the Criminal Court.

May 16th

Discernment decision by Minors' Judge

Having in consideration:

The general merit of the antecedents; in particular the joined discernment report⁹⁷ - pages x,y, z- which make it possible to assess the minor's limited risk to society and his ability for re-education and adaptation and according to the articles number 1, 18, 26, 8. 28 and 36 of the Minors' Law number 16618 is decided:

- that the minor X, 17 years old at the time of the investigated events, acted without discernment in the offence for what they are accused.
- Send the antecedents to the Court of Appeals.
- Communicate to the minor in person.
- Write it down and record it.

⁹⁷ Other way of naming the "psycho-social report"

May 17th

Document confirming that the decision was communicated to the youth in person.

June 7th

Court of Appeal review of discernment decision

Approval

In this trial the decision taken by the Minors' Court has been sent to review. According to their decision, the minor X acted without discernment in the offence for which he is accused in the criminal trial which is under investigation.

This judge shares the decision of the judge of the Minors' Court and states that her decision has been taken weighting the antecedents and according to legal rules. Therefore her decision is approved.

June 25th

Minors' Court takes a measure against the minor

Reviewing and having in consideration:

- The merit of the antecedents and the article number 29 and number 3 of the Minors Act N 16618, the minor X is submitted to the supervised release programme carried out by SIDTEL Maipu.
- Communicate this decision to the director of SIDTEL Maipu.
- Communicate to the minor and his father in person.
- Write it down and record it.

When the youth is put into custody in order to carry out the discernment evaluation, his or her defence lawyer asks for bail to the criminal court. A common way of requesting bail is the one presented below:

June 25th

Return of money paid for bail request

Y, youth parent, in case number xx respectfully state:

I request to your Lordship the return of the money deposited for the bail. The amount of money is \$20000.

Therefore, I respectfully request what I asked.

June 26th

Criminal Court desists taking action against the youth because of his age

- Considering the merit of the antecedents, in particular the discernment report carried out by the Minors' Court, I declare myself unable to carry out sentencing in this case.
- Register it in the appropriate books.
- Return the money deposited for obtaining release on bail.

July 23rd.

Request return of the bail money

Appears in court Y (Father of the child), age, marital status, date of birth, from Santiago, ID xx, address. He states:

I am before this court with the aim that you could make possible returning the money I paid for my son in order to get his release under bail.

Court decision:

Order to the Criminal Court the return of the amount of \$20000. This money was deposited in this Court on May 22nd towards bail.

August 23rd

Institution in charge of carrying out the measure ordered by the minors' judge to send the first report of the case to Minors' Court

Sistema integrado de tratamiento en libertad SIDTEL Maipu-Pudahuel

(Integrated system of treatments in liberty SIDTEL Maipu-Pudahuel)

- Report number
- Name
- Offence
- Date of report

In relation to the youth we can respectfully inform to your Lordship that:

He had received on July 4th the official note that communicates the decision of your Lordship about incorporate the youth to supervised release programme carried out by SIDTEL Maipu-Pudahuel.

According to that, we inform that we are aware of the case through the judicial files from your court and that we are ready to plan a visit to the youths' home in order to communicate your decision and agreeing a first appointment for an interview in our centre.

All the actions taken in order to start this process will be duly informed to your Lordship.

It is all we can inform to your Lordship.

Psychologist, Head of SIDTEL Maipu-Pudahuel

November 22nd

Second report by SIDTEL Maipu-Pudahuel to Minors' Court

- Report number
- Name
- Offence
- Date of report

In relation to the youth we can respectfully inform to your Lordship that:

On October 1st of the present year the first interview was carried out. X attended, accompanied by his mother. In this opportunity he was informed about all the formal aspects related to the measure imposed by your Lordship including all the requirements that he must accomplish during the length of this judicial decision. We could observe in the youth and his mother good will and commitment to accomplish the orders from your Court.

During the interview, and at the same time that we carried out the control of the measure, we developed an individual working plan along with the youth. The aims of the plan are giving support in the school to allow him to finish his last year of secondary education successfully in order to allow him to apply to a career in the army, as he wishes. It is relevant to point out that the youth will be 18 in December this year; however, he has indicated that he would like to continue with this intervention until the plan is accomplished.

Therefore, he has formally started the intervention with the youth and we will inform lately about the state of accomplishment of its objectives.

It is all we can respectfully inform to your Lordship for your knowledge,

Social worker, SIDTEL Maipu-Pudahuel.

February 7th, following year

Minors' Court puts end to the measure because the adolescent has reached adulthood

Considering that the accused has reached adulthood, I order the end of the measure of supervised release.

February 10th, following year

Report by SIDTEL Maipu-Pudahuel to Minors' Court

- Report number
- Name
- Offence
- Date of report *January 31st*

In relation to the youth we can respectfully inform to your Lordship the following:

The youth is attending this programme in SIDTEL Maipu-Pudahuel because of an order imposed by your court in August last year. During this time we have observed a high commitment with the measure and also with the agreements established in the plan of intervention of our centre. This commitment has continued even after the youth became an adult last December.

Accordingly, we can indicate that X has not committed new offences that could complicate his personal situation. Also we were informed that last December he satisfactorily finished secondary school and he is now in a better position to plan his future. He is waiting for the results of his

application to the Air Force because he would like to pursue a career in that area.

Considering that X has now reached adulthood but he has explicitly showed his interest in following this intervention voluntarily, we have discussed this situation and we consider that is pertinent keep working with him in the programme for the time necessary to accomplish pending objectives.

It is all we can respectfully inform to your Lordship for your knowledge,

Social worker

SIDTEL Maipu-Pudahuel

October 24th, following year

Minors' Court puts end to the measure because of adulthood reaching.

Considering that the accused has reached adulthood, I order the end of the measure of supervised release.

Mobile phone theft under the Act on Adolescents Penal Responsibility

This case illustrates the features of the procedures under the Act on Adolescents Penal Responsibility for an extremely common offence: mobile phone theft. As described in the main part of the thesis (see in particular chapter 4, section 4.5 and chapter 6), the contents of judicial files have changed, although some documents have been maintained, such as police reports and descriptions of plans of intervention. This case is a simple one and sentencing is quite straightforward, even though the process is not as short as it could be, for example, the time for carrying out an investigation of the offence is set in 40 days, but the investigation does not include new evidence and everything is based on victim statements and police accounts of the events. At the end, the adolescent does not attend to the court, nor is found at the address given so the trial gets suspended indefinitely.

August 20th

Police report

- Report antecedents
- Region: Metropolitan
- Type of police: police
- Date: 20/08/2007
- Prefecture: Cordillera
- Name of officer writing the report: A
- Name of the officer who carried out the procedures (arrest): B
- Public Prosecutor Office: Puente Alto

Antecedents of the Offence

- Offence coding: 804 Theft (Robo por sorpresa)
- Date: 20/08/2007 Time: 14:25
- Means used to commit the offence:

- Kind of weapon:
- Where the offence was committed: Public road
- Location: 9 C Avenue
- Type of property: House
- Region: Metropolitan
- Province: Cordillera

About items related to the report

- Category
- Serial number
- Description
- Value

Identification of the plaintiff

- ID
- Surnames/Names
- Date of birth
- Gender
- Nationality
- Level of schooling
- Activity
- Injuries
- Date and hour of summons
- Plaintiff address, telephone number and email.

Defendant Identification

- ID
- Surnames/Name
- Nickname
- Date of birth
- Gender: Male
- Nationality: Chilean

- Level of schooling: Primary School completed
- Activity: Unemployed
- Register of other offences or detentions:
- Date and hour of summons
- Address

Identification of the victim

- ID
- Surnames/Names
- Date of birth: 1966
- Gender: Female
- Nationality
- Level of schooling: Secondary Education
- Activity: Employed
- Injuries: No injuries
- Date and hour of summons
- Victim address, telephone number and email.

Identification of witnesses

- ID
- Surnames/Names
- Date of birth: 1976
- Gender: Female
- Nationality: Chilean
- Level of schooling
- Activity
- Date and hour of summons
- Witness address, telephone number and email.

First statement by the police

August 20th

In relation with the events, X, 17 years old, single, Chilean, primary school level of education, unemployed, ID number, address, Puente Alto (borough)⁹⁸ was arrested today at 14:30 in Y Avenue by the officers A and B due to the following event:

Moments before [the arrest] in the moments in which the police personnel carried out preventive patrolling in C Avenue, around the number xx, they were alerted by passers-by who indicated that the mentioned defendants had stolen a woman's mobile phone. Consequently, [the officers] proceeded to stop and search the persons previously mentioned founding that X was in possession of a mobile phone, silver colour of the brand Motorola, from the company D in the right hand pocket of his trousers. He could not explain satisfactorily that the phone was his. In the moment in which the personnel was carrying out the search control the victim Y, previously identified, arrived to the place. She declared that a while before, when she was in C Avenue (in front to the number xx, in this borough) she was using her silver coloured mobile phone of the brand Motorola from the company D. She carried her phone in her left hand when she was held up by three unknown individuals. One of them proceeded to take the mentioned phone and then all of them ran away by C Avenue towards the North. The victim identified the defendant X as the author of the offence. She recognised his features, the other persons accompanied him. She also declared that they got their clothes exchanged among them. She also recognised the recovered mobile phone as hers. Subsequently, the detainees were transferred to this police station and then, at 16:30, to Sótero del Río Hospital. They were not seen by the doctor earlier because of an administrative decision taken by the hospital.

⁹⁸ In the cases where there are more than one defendant, this paragraph introduces also their identities.

Injuries: X has bruises on his back, bruises on his right ankle, and a mild old scar on his abdomen, according to the doctor on shift at the Hospital. The certificates are attached to the report of handing of detainees to Gendarmerie of Chile.

Rights: detainees' rights were read aloud according to the articles 93, 94 and 135 from the Penal Procedure Code. With regard to the minors this right is also mentioned in the article 31 from the Act 20.084 and articles 37 and 40 from the UNCRC.

Personal Antecedents: They were requested to the Identification and Civil Register Office and they found the following: X does not have previous convictions or detentions.

Item recovered: A photo of the item was taken and then the item was returned to the victim.

Police personnel in charge of the proceedings were informed about this to the Public Prosecutor on duty, Mr. Z, who required the presence of the detainees in a detention control hearing.

The circumstances of the minors were reported to their mothers by the police. Afterwards they were sent to the Minors Police Unit with a copy of this report. That police unit will hand the minor on the 21st of this month at 09:00 AM in the Guarantee's Court of Puente Alto.

Police officer signature.

August 21st

Detention control hearing

- Date: 21/08/2007
- Magistrate
- Public Prosecutor
- Defence lawyer
- Defendants
- Starting time
- Finishing time
- Room
- Court: Guarantee Court of Puente Alto

Decisions and actions carried out

The detention is considered legal. However, information about the circumstances of the detention are required to the police unit due to the defendant X declared has been received mistreatment by the police officers while he was in the prison cell of that police unit.

Formalisation of the investigation

The Public Prosecutor requested preventive detention for the defendants.

According the Act 20.084 the minors preventive detention is refused and therefore the preventive measure stated in the article 155 b) from the Penal Procedure Code⁹⁹ will be put in place.

It is ordered of putting the minor X in liberty was given.

Investigation must be carried out within a period of 40 days.

⁹⁹ This article establishes surveillance as precautionary measure during the time between arrest and trial.

Formalisation of the individual

On August 20th 2007, about 14:25 while the victim Z passed along C Avenue talking by phone, she was held up by the defendants already identified, who unexpectedly took the Motorola silver coloured mobile phone from Entel Company that she carried in her left hand. They ran away from the place.

In opinion of the Public Prosecutor this events correspond to theft, described and penalised in the article 436 from the Penal Procedure Code. This offence was committed and the defendants are accused as authors of the offence.

Led the hearing and decided Judge XZ.

Summons

I certify that the victim Z has been called to this Public Prosecutor Office on Monday 3rd of September at 12:00 PM.

Assistant lawyer

September 3rd

Victim's Statement:

In Puente Alto, September 3rd of 2007, at 12:16 in the investigation of the case N° 1234 appears in court Mrs. Z, ID, date of birth, address, employed, telephone number, who set her residence in the address previously mentioned in order to receive callings and communications. She has been

noticed and called by the Public Prosecutor Office according the article 26 from the Penal Procedure Code and voluntarily states:

On August 20th 2007, at 14:20, in circumstances that I was talking by mobile phone, outside Puente Alto Shopping Centre located in C Street, I am not aware of the number, I felt a blow in my ear and I realised that an individual who dressed on Bermuda shorts, white trainers and light blue shirt had taken my phone. He ran away and at the same time two other individuals passed by my side and said something. I crossed the road and I followed the individuals that were walking towards the square. There I found some policewomen and I told them what had happened without realising that the policewomen were asking for ID from the individuals that had taken my mobile phone. I showed the policewomen the author of the theft. I told the police that he had changed his clothes while he was running away, he put a red jumper on. Finally, the guy had my mobile and the police gave it back to me.

Without anything else to add, this statement has been read and ratified completely.

Victim signature and ID

September 11th

Police Statement:

In Puente Alto, September 11th of 2007, at 12:16 in the investigation of the case N° 1234 appears in court Mrs. Y, Police Officer, ID, date of birth, address, employed, telephone number, who set her residence in the address previously mentioned in order to receive callings and communications. She has been noticed and called by the Public Prosecutor Office according the article 26 from the Penal Procedure Code and voluntarily states:

I ratify the police report.

On August 20th 2007, at 14:25 hours approximately, I was on the first shift carrying out preventive patrolling by C Avenue from north to south when a passerby told us that an individual had taken a mobile phone from a lady that was talking outside Puente Alto shopping centre. He described the physical characteristics and clothing of this individual. We started to walk, looking for the individuals; there were three according to the gentleman. Then we recognised a youth whose characteristics coincided with the ones we had been informed because of that we thought immediately that we had found the individuals that we were searching for. We asked them to stop and we requested their IDs. They said that they did not have their IDs. We searched them and we found that one of them had a Motorola mobile phone in the left pocket of his trousers. When we asked about the origin of the phone, he just said it was of his property. Just in that moment, a lady came accusing one of the detainees as the person that a moment before had taken her mobile phone. She also added that once they got the phone they escaped towards the square.

From the set of pictures that you show me, I recognise the person in the picture number 11 as the individual who had the mobile phone. I ratify he is X, who the day of the events was with the persons in the photos number 5 and 7.

I have nothing else to declare. This statement has been read and ratified in all their parts.

Police officer signature

Public Prosecutor

There is another statement made by the police which is exactly the same, showing that statements are in general, very standardised. In this case the

only difference was the identification of the defendants in pictures that apparently were not shown to the second policewoman.

September 12th

Victim Statement:

In Puente Alto, September 12th of 2007, at 8:30< PM in the investigation of the case N° 1234 appears in court Mrs. Z, employee, ID, date of birth, address, employed, telephone number, who set her residence in the address previously mentioned in order to receive callings and communications. She has been noticed and called by the Public Prosecutor Office according the article 26 from the Penal Procedure Code and voluntarily states:

From the group of 12 pictures that are shown to me in this moment, I identify the individual in the picture number 11 as the person that took my phone while I was using it outside Puente Alto shopping centre. The person in the picture number 11 is X.

I also identify the individuals in pictures 5 and 7 as the people that accompanied the author of the theft. After taking my mobile phone they walked towards the square. The pictures with people identified correspond to A and B.

I have nothing else to declare. This statement has been read and ratified in all their parts.

Victim signature

October 1st

A hearing was scheduled to communicate the closure of the investigation to all participants.

October 5th

- Date: 05/10/2007
- Magistrate
- Public Prosecutor
- Defence lawyer
- Defendants
- Time of starting
- Time of finishing
- Room
- Court: Guarantee Court of Puente Alto

Actions carried out

The defence desists from their previous request to close the investigation.

The court, in agreement with all the involved in the case, set a date and time for a summary procedure (short proceeding). It will be carried out on October 30th 2007 at 10:30.

Notify by ID in their residences to the defendants XX and XY.

Judge signature

October 9th

Corporación Promesi, Puente Alto.

- Name
- Case number
- Offence: Thief
- Date: October 9th

To: Judge Guarantee Court of Puente Alto

From: PPP. Delegate of precautionary measures

In relation to the identified youth, I can inform to Your Ladyship that he has not completed the precautionary measure described in the article 155b) from the Penal Procedure Code which was ordered by this court on August 21st 2007.

The youth was visited on 27/08/07, 03/09/07 and 04/10/07 and on all occasions nobody was found in the residence. However, we left an appointment date for an interview in our Centre to which the youth has not attended but his mother has. She confirmed that her son would attend.

This is everything that I can inform to Your Ladyship.

Kind regards

PP

December 12th

Puente Alto

Police Report numbers 1234 and 1123 from the Criminal Squad of Puente Alto recount that the detention order numbers 2233 and 2244 sent to them

from this court against YY and XX could not being carried out because the persons could not be found.

According this and considering the articles 99a) and 101 of the Penal Procedure Code, the defendants are declared in rebellion.

Notify to the Public Prosecutor Office and the Defence by email.

Judge.

March 18th next year

Detention control hearing

- Date: 05/10/2007
- Magistrate
- Public Prosecutor
- Defence lawyer
- Defendants
- Time of starting
- Time of finishing
- Room
- Court: Guarantee Court of Puente Alto

Actions carried out

July 7th

Puente Alto

As it was required, call to a temporary stay of proceedings hearing with regard to the defendant X on July 25th 2008 at 8:30 AM.

Notify by email to the Public Prosecutor Office and defence lawyer.

July 25th 2008

Temporary stay of proceedings hearing

- Date: 25/07/2008
- Magistrate
- Public Prosecutor
- Defence lawyer
- Defendant
- Defendant ID
- Time of starting
- Time of finishing
- Room

Court: Magistrates Court of Puente Alto

Actions carried out:

It is stated that this court overrules the motion made by the defence about diktat temporary stay of proceedings.

There are no more requests made by the involved.

Leaded the hearing and decided.

Judge

July 31st

Puente Alto

Taking into account that the request about temporary stay of proceeding of this case made by the Public Prosecutor was not accepted and considering the article 370 of the Penal Procedure Code, this court overrules the appeal presented by the Public Prosecutor against the decision made in the hearing carried out on July 25th 2008 as inadmissible.

Appeal to the Magistrates Court

YY, Public Prosecutor for Puente Alto, address, in the case record for the offence of theft against XX, I respectfully state:

By the means of this act, within the specified period and according the article 364 and following articles from the Penal Procedure Code, I lodge an appeal against the decision made by this court through the judge Y on July 25th which was notified to me the same day that it was taken. In that decision the motion of a temporary stay of proceedings due to the defendant's rebellion was overruled. Consistent with the articles 99 and 252b) from the Penal Procedure Code, I request that this plead is admitted and the antecedents are sent to the Appeals Court in order to contest this decision.

Actual and juridical assumptions of the motion for temporary stay of proceedings: On August 21st, the detention control hearing in the Guarantee's Court of Puente Alto was carried out according article 132 from

the Penal Procedure Code. Also the formalisation of the investigation of theft against the defendants as material perpetrators (article 15, number 1 from the Penal Procedure Code) was carried out.

During the proceedings, the defendant X was required to report to the judge through a detention order with the aim of carrying out a short hearing (summary hearing).

On December 12th the defendant was declared in rebellion (*as he did not attend court*) by the same court. This was decided mentioning the police report number 1234 from the same date which stated that the defendant was not found despite police searching.

Due to the same reasons, a motion for a hearing to determine the temporary stay of proceedings was made on July 7th. The court accepted the motion to be carried out on July 25th at 8:30.

On July 25th, the hearing took place under the direction of the judge Y. In the hearing, and after a summary of the procedures fulfilled in the case, the judge was allowed to speak to the people involved whom, according to the article 252b) from the Penal Procedure Code, requested the temporary stay of proceedings. Nonetheless, it was a big surprise when the court decided to overrule the motion. In the opinion of the court and attending to the tenor of the article 101 from the Penal Procedure Code in which the consequences of rebellion are stated. The consequences stated in the law do not prevent carrying on with the investigation, which should continue until the hearing of preparation for oral trial. The decision does not give further explanation nor makes clear how this is linked to the temporary stay of proceeding.

Mistake of law and properness of a stay of proceedings: The court's decision incurs, in our opinion, in a mistake of law because confuses the effects of the

rebellion in the investigation with the origin of the temporary stay of proceeding.

Actually, in order to decree the stay of proceeding in a case, according to the article 252b) from the Penal Procedure Code and legal doctrine, it is necessary the fulfillment of one of the following requirements:

- a) There must be a current detention order against the defendant
- b) That the defendant is not present as result of a failure to accomplish a detention order
- c) That, as consequence of the procedures above, the defendant is declared in rebellion.

Then, under the merits of what it was mentioned above, a stay of proceeding is absolutely appropriate. The court confounded the consequences of being a rebel during the investigation, which does not mean suspending the investigation, with the appropriateness of the stay of proceeding. To carry out the stay of proceeding is not even necessary to continue until a subsequent stage of the procedure, because this way of thinking would imply that:

- a) To infringe the principle of procedural economics (*using economic efficiency in the procedures*) because an obligation of following with a proceeding against somebody who demonstrated do not have any interest in appearing in court and even less interest in accomplishing the orders given by the court.
- b) It would oblige the Public Prosecutor Office to close and draw up an accusation only to declare the case dismissed because after all the time that has passed it is known that the defendant is not willing to collaborate with the minimum requirement which is appearing in court.
- c) To prolong unnecessarily and with evident detriment of the procedure.
- d) To force an interpretation of article 252b from the Penal Procedure Code, which is the article that regulates the temporary stay of proceedings, instead

of article 101 (as the court mistakenly used). Article 252b does not mention in any part that the closing of the investigation or the formal accusation of the defendant is required, as the court tries to use. Article 248 gives the Public Prosecutor several options, and from reviewing the article it cannot be inferred that only when the investigation is closed and the accusation is made it could be possible a temporary stay of proceedings. The argument used by the court is also dangerous because the presence of the defendant may be necessary (for instance, to carry out medical examination) and if a stay of proceedings were denied the Public Prosecutor may have to make accusations without all the antecedents only to respect the judicial times. This could cause big damage.

Hence, developing a systematic analysis, we conclude that the most coherent answer is a temporary stay of proceedings at any stage of the procedure when the defendant is declared in rebellion.

Appeal's admissibility: we want to emphasise that according articles 370b and 253 from the Penal Procedure Code, the decision made by the court is one of those which admit appeal.

Specific request: That the decision is revoked, decreeing in its replacement the temporary stay of proceedings in the defendant's favour.

Therefore, according to the arguments set out and articles 99a and 252b from the Penal Procedure Code. Also articles 432 and 436, 2nd subsection form the Penal Code and the rest of relevant laws.

I plead: Please consider this appeal against the decision made by Her Lordship on July 28th lodged within the specified period. Please admit this plea for appeal before the Court of Appeal of San Miguel with the aim of

making that the Court revokes the decision indicated and proceed with the request made by the Public Prosecutor.

Public Prosecutor of Puente Alto signature

August 29th

We communicate that the Court of Appeals has rejected the plea made against the decision taken by this Court. The temporal stay of proceedings was not conceded.

Supervisory Judge of Puente Alto